SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1955.

No. 323

UNITED STATES OF AMERICA, ex rel., DAVID DARCY,
Petitioner,

vs.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, David Darcy, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this

case on June 9, 1955, affirming a judgment of the United States District Court for the Middle District of Pennsylvania, dismissing a petition for writ of habeas corpus.

1.

OPINIONS BELOW.

The opinion of the District Court dismissing the petition for writ of habeas corpus without permitting relator to introduce evidence in support of his contentions is reported in 97 F. Supp. 930.

The opinion of the United States Court of Appeals for the Third Circuit, remanding the case to the District Court for a full hearing on the issues of the alleged atmosphere of hysteria and prejudice prevailing at the relator's trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, is reported in 203 F. 2d 407.

The opinion of the District Court, after a hearing relating to the circumstances under which the relator was tried in Bucks County, Pennsylvania for felonious homicide in the commission of an armed robbery, is reported in 130 F. Supp. 270.

The opinion of the United States Court of Appeals for the Third Circuit, affirming in a divided (4-3) decision, the opinion rendered by Hastie, Circuit Judge, as well as the decision of the District Court is not reported. The majority dissenting opinion, rendered by Kalodner, Circuit Judge, concurred in by McLaughlin, Circuit Judge, and another separate dissenting opinion rendered by Biggs, Chief Judge, entered on June 9, 1955 is appended to this petition (pp. 78-102).

The divided 4-3 order of the Court of Appeals denying a petition for rehearing is not reported.

STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Annotated, Section 1254 (1), as well as under Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

2. Petitioner was convicted of murder in the first degree, with penalty fixed at death, in the Court of Oyer and Terminer of Bucks County, Pennsylvania, after a jury trial, on June 14, 1948.

3. The judgment of the Court of Appeals sought to be reviewed was entered on June 9, 1955. A petition for rehearing of said judgment was denied by the Court below on July 11, 1955.

4. On July 15, 1955, the Court below entered an order staying the mandate in this case until August 15, 1955 to permit petitioner to make application to this Court for writ of certiorari.

3.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES.

The Revised Judicial Code, 28 U. S. C. A. Section 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless ——

* * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *"

PENNSYLVANIA STATUTES.

The Act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Penna. Statutes Annotated, Section 4701:

> "* * * Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict * * *."

The Act of March 31, 1860, P. L. 427, Section 40, 19 Purdon's Penna. Statutes Annotated, Section 785:

> "* * * In all cases in which two or more persons are jointly indicted for any offense, it shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials * * *."

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in holding that petitioner in a habeas corpus proceeding, under sentence of death for murder, who claimed that he had been denied a fair trial in a state capital case because of the atmosphere of hysteria

and prejudice prevailing at his trial and because of the interest, attendance and participation of an "overseer judge" in his case, had not been denied due process of law under the Fourteenth Amendment merely because there was no proof that the physical presence of a mob or a threat of mob violence dominated his trial, but where, however, there was the following proof of a more subtle, yet even more effective, type of domination of his trial by prejudice and hysteria; that, immediately following a hold-up murder in a small rural county, there was expressed public sentiment and prejudice against the four youths involved; that local newspapers carried inflammatory and prejudicial front-page reports of the crime of the "trigger-happy bandits" from Philadelphia and of their confession of this and other hold-ups, in four of which the petitioner was erroneously included as a participant; that newspaper editorials criticized leniency of juries in not imposing death penalties and condoned "mob law"; that, prior to the trial of his companions, public sentiment throughout the county was vociferous in condemning the bandits and in demanding the death penalties; that, daily during the two weeks of his companions' trial, the newspapers carried inflammatory front-page reports of the trial and of petitioner's role in this and other hold-ups, although in four thereof he was not involved; that local radio stations broadcasted news of that trial; that petitioner had originally been granted a separate trial, scheduled for the term of court following the trial of his companions; that, suddenly, at the end of the first trial, petitioner's trial was scheduled to start immediately after his companions' trial; that the jury panel, from which his jury was selected, appeared in court during the first trial and had the opportunity to listen thereto; that petitioner's trial started three days after the first cases ended, while the newspaper and radio publicity were still fresh; that the voir dire examination of the petitioner's jury showed a marked

increased fixity of opinion of prejudging of and prejudice against him; and that, during his trial, the trial judge in his companions' case, whom the jury "knew" as being hostile to petitioner and who had publicly voiced his indignation against these "outlanders," showed such an extraordinary interest in the proceedings by his excessive attendance and active participation thereat as to guide and influence the jury's verdict and imposition of the death sentence?

2. Did the Court of Appeals err in holding that the "extraordinarily unprecedented conduct" of a judge, other than the trial judge in the petitioner's case, was not so unfair and prejudicial as to amount to a denial of due process of law, where there was proof that said "overseer judge" had presided at the trial of petitioner's companions; that he had publicly praised that jury for having imposed the death penalties; that he was present every day and even attended an evening session during the petitioner's trial either on the bench with the trial judge or at a prominent position facing the jury as a spectator in the court room; that at times he joined the trial judge on the bench "for whispered consultations" within view of the jury; that during one such consultation he, rather than the trial judge, actually made a ruling on a vital evidentiary issue; that during the charge to the jury he actively helped the prosecutor; that he was identified by the jurors as "an official who was hostile" to petitioner; and that such "rather striking manifestation of extraordinary interest" and participation effectively guided and influenced the jury's verdict, fixing the penalty at death rather than at life imprisonment?

REASONS FOR ALLOWANCE OF WRIT.

1. Each of the questions presented herein embodies an important question of federal law which has not been, but should be, settled by this Court.

2. All seven (7) of the judges in the court below were of the opinion as stated by the majority that: "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wiser to take such precautions * * *." Four (4) judges were "not (be) convinced that failure to follow the *wiser course* was a denial of the essence of fair trial." Three (3) judges were convinced that such failure to change venue or to continue the trial constituted a denial of due process. Such decided difference of opinion presents an important question of federal law which has not been, but should be, settled by this Court.

3. All seven (7) of the judges in the court below recognized that Judge Boyer's "rather striking manifestation of extraordinary interest in the proceedings" constituted a "dubious occurrence" in state procedure. Four (4) judges believed that they should "leave alone * * * (such) dubious occurrences in state procedure which we would proscribe if they should happen in a federal court." Three (3) judges were convinced that such "dubious occurrence" constituted a fundamental impropriety in a state trial which should be

corrected by a federal court under the due process clause. Such decided difference of opinion presents an important question of federal law which has not been, but should be, settled by this Court.

4. The decision herein recognizes that there were many "dubious occurrences" in petitioner's trial which would have been proscribed if they had happened in a federal court, but which must be left alone because they occurred in a state court. Such rationale overlooks and ignores the basic test of determining whether or not there has been a denial of due process of law in the enforcement of a state's criminal law—namely, whether the proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." Certainly, the proceedings in petitioner's trial—in and out of the court room, both before and during the trial—establish that he did not receive a fair trial. The conduct of the trial was, indeed, such that "shocks the conscience."

5. The decision herein, holding that the petitioner in a habeas corpus case has not been denied due process of the law merely because there was no proof that the physical presence of a mob or a threat of mob violence had dominated his trial on a capital charge in a state court, departs from the accepted and usual course of judicial proceedings, in that such decision incorrectly applies the principles of *Johnson v. Zerbst*, 304 U. S. 458 (1938) and *Betts v. Brady*, 316 U. S. 455 (1942) by narrowing—instead of broadening—the scope of inquiry in habeas corpus proceedings under the Fourteenth Amendment, especially since there was in this case proof of a more subtle and even more direct type of trial domination—(a) that the local newspapers, by their inflammatory and prejudicial articles and editorials, car-

ried on a campaign to secure the death penalty for petitioner, irrespective of the evidence and extenuating circumstances, (b) that such newspaper campaign influenced and guided public opinion to such a degree that by the date of the petitioner's trial the death penalty eventually imposed had already been prejudged, (c) that the petitioner's trial, originally scheduled to start at the term of court following the trial of his companions, was suddenly rescheduled to start immediately thereafter when it was apparent that death penalties would be imposed in that trial, (d) that the jury panel selected to try petitioner had been present in the court house during the trial of his companions, (e) that 89% of the jurors asked the question had answered that they had read the newspaper accounts of the prior trial, 50% of those asked answered that they had discussed the case, and 30% of those asked answered that they had fixed opinions about the case, and (f) that petitioner was tried by a "two-judge" bench, consisting of the trial judge and the judge who had just three days before completed presiding in the trial of his companions, and had publicly praised the jury's fixing their penalty at death as the only possible penalty, who acted as an "overseer judge" and also as an aid to the prosecutor in petitioner's trial, who was known by the jurors to be "hostile" to petitioner, and whose attendance and active participation influenced and guided the jury's imposition of the death penalty.

6. The decision herein holding that such "overseer judge"'s "extraordinary and unprecedented conduct" and "rather striking manifestation of extraordinary interest in the proceedings" did not deny petitioner of a possible unprejudiced jury determination of the penalty to be imposed—whether death or life imprisonment—and did not deny him the due process guaranteed by the Fourteenth Amendment departs from the usual and accepted course of judicial proceedings

and, also, overlooks the fact that such conduct is "offensive to the common and fundamental ideas of fairness and right."

7. The decision herein is at variance and in conflict with the decision of this Court in *Moore v. Dempsey*, 261 U. S. 86 (1923), as broadened by *Shepherd v. Florida*, 341 U. S. 50 (1951), that defendant should not be compelled to undergo a trial dominated by passion and prejudice.

8. The decision herein appears to be in conflict with other applicable decisions of this Court.

STATEMENT OF THE CASE.

I.

History.

Darcy, the petitioner, then 22 years old, and three companions, Foster, 23, Zeitz, 18, and Capone, 16, engaged on December 22, 1947 in the armed robbery of the Feasterville Tavern near Doylestown, Bucks County, Pennsylvania. While the four youths were fleeing in an automobile from the scene of the robbery, a bystander, Kelly, was shot and killed by Zeitz.

As a result of this homicide, the petitioner and his three companions were jointly indicted in the Court of Oyer and Terminer of Bucks County, Pennsylvania, at No. 37, February Sessions, 1948 for the murder of Kelly, growing out of armed robbery.

Petitioner requested and was granted severance. Capone pleaded guilty.

Foster and Zeitz, two of petitioner's companions in the robbery, were tried first on this charge, before a jury presided over by Judge Calvin S. Boyer. The trial started on Monday, May 24, 1948 and ended on Friday, June 4, 1948. The jury returned a verdict of first degree murder and, in the exercise of their discretion as authorized by Section 701 of the Penal Code of 1939 (18 Purdon's Penna. Statutes Annotated, Section 4701) fixed the penalty of death. The judgments and sentences were affirmed, and opinions are reported at 364 Pa. 288, 72 A. 2d 279 and 364 Pa. 294, 72 A. 2d 282.

The petitioner was placed on trial in the same court, before President Judge Hiram H. Keller and a jury on Monday, June 7, 1948—just three days after the convictions and sentences of Foster and Zeitz.

Petitioner's trial took place in a hostile and prejudicial atmosphere just 3 days after the conviction of the co-defendants of murder in the first degree with penalty fixed at death, and after widespread publicity had been given to the case almost continuously from the day of the crime and particularly during the two weeks' trial of said co-defendants and, also, after public prejudice had become intensified against the defendants and after widespread publicity had been given to Judge Boyer's praise of the jury and the death penalties in the Foster-Zeitz trial. On June 14, 1948, the petitioner was found guilty of murder in the first degree and in his case, also, the jury fixed the penalty at death.

A history of the proceedings subsequent to petitioner's conviction and sentence is as follows: A petition for a new trial was filed and was denied by the trial court, Darcy's conviction and sentence being affirmed. An appeal was taken to the Supreme Court of Pennsylvania and the judgment of the court below was affirmed, Mr. Justice Jones dissenting. See *Commonwealth vs. Darcy*, 362 Pa. 259, 66 A. 2d 663. Application for certiorari to the Supreme Court

of the United States was denied. See 338 U. S. 862. Darcy next filed a petition for habeas corpus to the Supreme Court of Pennsylvania, being the first such petition filed to that court. It was denied without opinion. An application for certiorari to the Supreme Court of the United States was denied. See 338 U. S. 862.

Darcy then applied to the Supreme Court of Pennsylvania for certiorari to the Court of Oyer and Terminer of Bucks County, Pennsylvania and for reargument nunc pro tunc. In this application, petitioner raised the same questions as those set forth in his instant petition, save one, viz., that Darcy's counsel would not permit him to take the stand. The application was denied by the Supreme Court of Pennsylvania without opinion. No application for certiorari to this Court was made from this denial. On April 3, 1951, the same day on which Darcy's petition to the Pennsylvania Supreme Court for certiorari and for reargument nunc pro tunc was denied by said court, Darcy filed his petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania. Insofar as applicable to the instant appeal[1] the petition alleged that he was in custody in violation of the Fourteenth Amendment of the United States Constitution (28 U. S. C. A. 2241) because: (1) the relator was tried in an atmosphere of hysteria and prejudice, since the newspapers in Bucks County by their detailed and inflammatory front-page accounts of the crime and of the Foster-Zeitz trial and by their editorial policy literally demanding the death chair for the relator and his companions had rendered impossible the impaneling of a fair and impartial jury in the Darcy trial, Darcy having been put to his

[1] The petition also alleged that Darcy was deprived of the rights guaranteed to him by the Fourteenth Amendment by reason of the lack of effective assistance of counsel. The Court, in its Per Curiam Opinion, **203 F. 2d 407**, sustained the action of the District Court in denying the petition for habeas corpus based on this allegation.

trial almost immediately—3 days—after that of Foster and Zeitz, who had been found guilty of first degree murder, with death penalty; and (2) that Judge Calvin S. Boyer, the judge at the earlier Foster-Zeitz trial, who had already demonstrated prejudice against all the robbers and who had publicly praised the jury in the Foster-Zeitz case for having fixed the penalty at death for the relator's co-defendants, frequently visited in the court room and even attended a night session during the relator's trial and, particularly, frequently appeared on the bench, together with Judge Keller, during Darcy's trial and, on one occasion, while sitting with Judge Keller, made a comment adverse to Darcy on a critical issue of evidentiary law, and participated in the consideration of the ruling made immediately thereafter adverse to Darcy's position (7a-10a).

The petition came on for hearing on April 5, 1951, on an order so directing, which also stayed Darcy's execution until the final disposition of the petition by the court below. The Commonwealth moved orally to dismiss the petition as insufficient in law.

The grounds raised by the petition for habeas corpus filed in the District Court were not set up in the first petition for habeas corpus filed to the Supreme Court of Pennsylvania. Because of this the District Court further stayed Darcy's execution to permit him to exhaust his State remedy, by filing a second petition for habeas corpus to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the second petition for habeas corpus filed to it, sub nom. *Commonwealth vs. Claudy*, 367 Pa. 130, 79 A. 2d 785, based on every substantial ground alleged in the present petition. The instant case then came on for further hearing on April 10 and 11, 1951. Darcy moved orally in the alternative for (1) the writ, or (2) for an additional stay pending application by him to the Supreme Court of the United States for certiorari. On April 11, 1951, the District Court

dismissed the petition, pointing out that by the terms of the orders the stay of execution was at an end. The District Court filed an opinion reported sub nom. *United States vs. Handy*, 97 F. Supp. 930.

After the dismissal of the petition and the denial of further stay by the District Court, application for certiorari was made to the Supreme Court of the United States and the application denied. See 342 U. S. 837. Darcy, meanwhile, on April 11, 1951, had appealed to the United States Court of Appeals for the Third Circuit.

The District Court having refused a certificate for probable cause for appeal, Circuit Judge Maris, allowed the same. The matter was first argued on January 7, 1952 before a "three judge division" composed of Biggs, Chief Judge, Kalodner, Circuit Judge, and Burns, District Judge. Due to the seriousness of the alleged charges in the petition, the matter was reargued on December 1, 1952, nearly 11 months later, before the Court of Appeals en banc.

The District Court originally dismissed the petition without permitting relator to introduce evidence in support of his contentions. 97 F. Supp. 930. In a Per Curiam opinion filed March 24, 1953, the majority of the court (Biggs, C. J., McLaughlin, Kalodner, and Hastie, J. J.) held that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus in so far as they related to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record did not countervail the allegations of hysteria and prejudice. The minority of the court (Maris, Goodrich and Staley, J. J.) held that the District Court had properly dismissed the petition, in the opinion reported at 203 F. 2d 409.

The respondent thereupon filed a petition for rehearing

pursuant to Rule 33 of the Court of Appeals. The rehearing was denied on April 29, 1953. Respondent thereafter filed a petition in this court for writ of certiorari to the Court of Appeals. This application was denied on October 26, 1953. See 346 U. S. 865.

The case was remanded to the District Court for a full hearing on the indicated issues of alleged hysteria and prejudice, including the asserted excessive interest and participation by Judge Boyer in the relator's trial. A hearing was held, with the relator present, before Hon. John W. Murphy, District Judge on March 11, 12, 13, 16-20, 1954. The relator called 22 witnesses and offered 137 exhibits. The respondent called 11 witnesses and offered 6 exhibits.

After said hearing, the District Court on February 12, 1955 entered an order dismissing the petition for habeas corpus on the ground that it was satisfied that relator's proof was insufficient to establish that his trial had been fundamentally unfair (1191a-1241a).

The District Court having refused to grant a certificate of probable cause, Circuit Judge Kalodner granted a certificate of probable cause.

The matter was argued before the Court of Appeals en banc on April 4, 1955. Thereafter in a divided 4-3 opinion, the court below affirmed the judgment dismissing the petition. The majority opinion was written by Hastie, Circuit Judge, concurred in by Maris, Goodrich, and Staley, Circuit Judges. A dissenting opinion was filed by Kalodner, Circuit Judge, which was concurred in by McLaughlin, Circuit Judge. A separate dissenting opinion was filed by Biggs, Chief Judge. The opinion is not yet reported but is annexed to this petition (pp. 78-102).

Thereupon, a petition for rehearing was duly filed in the Court of Appeals. Rehearing was denied in a divided 4-3 order on July 11, 1955.

The Court below, on July 11, 1955 entered an order stay-

ing the mandate until August 15, 1955 in order to give petitioner an opportunity to make application for certiorari in the Supreme Court of the United States.

II.

Statement of Facts.

The proof adduced by petitioner that he had been tried in an atmosphere of passion, prejudice and hysteria, abetted by the excessive interest and participation by Judge Calvin S. Boyer, who was not the trial judge in petitioner's case, all in contravention of the Fourteenth Amendment of the United States Constitution, was as follows:

A.

The Local Press, By Editorials, News Stories And Comments, Prejudged Darcy's Case and Dictated An Out Of Court Campaign To Assure his Receiving The Death Penalty.

(a)

Prejudicial Newspaper Articles and Editorials: Prior to Foster-Zeitz Trial:

"The *crime* Darcy and his associates had committed was a *brutal and notorious one.* There is no doubt that great animosity was stirred in the minds of persons in the vicinage by reason of the armed robbery and the murder of Kelly

and that feeling ran high." Biggs, C. J., 203 F. 2d 407, at 414, footnote 8.

Immediately following the crime on December 22, 1947, there was a tremendous amount of newspaper publicity of an inflammatory nature. The four leading newspapers of Bucks County—"The Doylestown Daily Intelligencer", the "Bristol Daily Courier", and the "Newtown Enterprise" and the "Quakertown Free Press"—by their articles and editorials reported every detail of this passion-arousing crime and dictated an out-of-court campaign to prejudice the citizens of Bucks County against the defendants and to demand the death penalty for them. The coverage of these newspapers was widespread throughout all sections of Bucks County.[2]

The *out-of-court campaign* carried on by these newspapers—and, particularly, "The Doylestown Daily Intelligencer"—to dictate the death penalty for the relator, as well as for the other defendants, commenced immediately following the holdup and murder, grew in intensity and

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[2] The population of Bucks County during 1947 and 1948 was 107,715 (Rel. Ex. 124, Pa. Manual 1947-1948). The "Doylestown Daily Intelligencer", a daily newspaper, was located in Doylestown Borough, the County seat (pop. 5262), having a circulation in 1948 of 5329, primarily in the center of the county—Doylestown, Newtown, and parts of Montgomery Valley, although it was widely distributed throughout the county. The "Bristol Daily Courier", a daily newspaper, was located in Bristol Borough (pop. 11,895), having common ownership with the Doylestown Daily Intelligencer, and had an average circulation of 5,397, primarily in eastern and lower Bucks County and, particularly, in Morrisville, Penndel, Bristol Twp. and Bensalem Twp. During this period the "Bristol Daily Courier" received its news coverage of the crime, as well as of both trials, from the "Doylestown Daily Intelligencer". The "Newtown Enterprise", a weekly newspaper, located in Newtown Borough (pop. 2,009) had a circulation in 1948 of 1,972, within a five mile radius of Newtown. The "Quakertown Free Press", a weekly newspaper, located in Quakertown Borough (pop. 3,150), had a circulation of 5,000, principally within a 25 mile radius of Quakertown (392a; 208a, 239a; 279a, 383a, 385a-387a; 273a, 389a-390a).

reached its climax with the reporting of the Foster-Zeitz trial.

The reports of the crime were detailed, headlined, front-page articles immediately following the murder on December 22, 1947;[3] reports of the crime were featured in many of the Doylestown Daily Intelligencer issues during January, February, March and April down to the date of the beginning of the Foster-Zeitz trial;[4] and *grew in intensity during the Foster-Zeitz trial*, reaching its climax in the Doylestown Daily Intelligencer issue of Saturday, June 5, 1948.[5]

The newspaper articles were uniform in their characterization of the defendants as "bandits" "thugs" "trigger happy youths" and "Philadelphians". The articles were more than newspaper coverage of a crime; they were in the nature of crusades against these defendants and other "outlanders" who dared to come into Bucks County to commit crimes.

Articles, editorials and comments were published in said newspapers from December 23, 1947 to May 22, 1948, continuously reminding the public of Bucks County of the heinous nature of the crime:

> The Intelligencer issue of *December* 24, 1947 (Rel. Ex. 14-15; 959a, 963a), under the heading "*Bandits Admit*

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[3] **Pre-trial Foster-Zeitz and Darcy:** Doylestown Daily Intelligencer, December (6 issues), Rel. Exs. 12 to 22 incl.; January (4 issues), Rel. Exs. 23 to 29 incl.; February (6 issues), Rel. Exs. 31 to 42 incl.; March 1 and 3 (2 issues), Rel. Exs. 43 to 45 incl.; April 2, 3, 17 (3 issues), Rel. Exs. 46 to 48 incl.; Newtown Enterprise, Rel. Exs. 107, 108, January 1, 1948 (953a-974a; 976a-981a-998a; 999a; 1001a; 1106a, 1108a).

[4] **Pre-Foster-Zeitz Trial:** Doylestown Daily Intelligencer: May 7, 12, 14, 19 (4 issues), Rel. Exs. 49 to 54 incl. (1005a, 1007a).

[5] **Foster-Zeitz Trial:** Doylestown Daily Intelligencer, May 24, 25, 26, 27, 28, 29 (6 issues), Rel. Exs. 55 to 66 incl.; June 1, 2, 3, 4, 5, (5 issues), Rel. Exs. 67 to 79 incl. (1009a-1040a; 1044a-1074a).

Shooting Five Persons in Holdups" referred to the defendants as "*trigger happy*" youths, quoted the relator as "*boastful*" and mentioned that they were *involved in a series of tavern robberies in the Bucks and Philadelphia Counties area.*

The Intelligencer issue of *December* 26, 1947 (Rel. Exs. 16-17; 964a, 966a), under the heading "Murder Now Faces the Four Bandits", in a subheading referred to the fact that "Dead Man Was Shot on Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men *Callously* During the Holdup".[6]

The Intelligencer issue of *December* 27, 1947 (Rel. Exs. 18-19; 967a-969a) in another headlined frontpage article referred to the prosecution of the "*Philadelphia's Four Young 'trigger happy' bandits.*"

The Intelligencer issue of *December* 29, 1947 (Rel. Ex. 21; 972a-973a) in a headline frontpage article, under the heading "Murder Victim Funeral Held Last Saturday" referred to the murder of Kelly—a "*Popular Citizen of Trevose Area*" and again referred to the four defendants as "*trigger happy bandits.*"

The Newtown Enterprise weekly issue of January 1, 1948 (Rel. Exs. 107-108; 1106a-1110a), under the frontpage heading: "*Easy Xmas Money Was Bandits Aim*" referred to the "Four Philadelphia Bandits Who Shot Up Two Taprooms in Lower Bucks County.".

Simultaneously with the coverage of the crime there commenced in the Doylestown Daily Intelligencer *an editorial policy* designed to secure the electric chair for the youths

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[6] Under sub-heading **"Feeling Runs High"** it is stated: "The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a **'break' for society** at large to have the trials in Bucks County rather than in Philadelphia" (965a, 966a).

involved in the Feasterville Inn holdup. Said editorial campaign started with the editorial, headed: *"Fast Police Work"* in the Intelligencer issue on *December* 27, 1947 (Rel. Ex. 20; 970a-971a).[7] This editorial especially condemned a Philadelphia jury which had recently given the killer of two cops life imprisonment instead of the electric chair. Shortly thereafter another passion-arousing editorial headed *"Errors of Jurors"* appeared in the Intelligencer issue of *December* 31, 1947 (Rel. Ex. 22; 974a-975a). This editorial referred to *"Criticism of the Inefficiency of Jurors"* and stressed that particularly in murder cases *"juries frequently render verdicts that it is difficult to explain"*. This editorial did not advise the reader that each case must be decided under the evidence and under the law.

The newspaper publicity of the offense did not diminish in its intensity within a week or two after the crime. Periodi-

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[7] **FAST POLICE WORK**

THE ROUNDINGUP of the young gunmen who robbed the Feasterville and Penndel cafes and admitted many other robberies, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely is what is done to these potential killers when they come before the bar of justice.

One of the victims of the **callous shootings** has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the **young gunmen** remarked that it was lucky that no State Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by **trigger-happy bandits**, it is not difficult to believe that the gangster meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently * * * when a jury predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the previous record of the killer (970a, 971a).

cally, until almost preceding the Foster-Zeitz trial, there appeared reminders of the holdup and killing, as well as other holdups in which these youths had been involved, and also reminders of the danger of leniency in dealing with these defendants.

"The Gossiper" column in the Intelligencer issue of January 16, 1948 (Rel. Ex. 25, 979a) stressed that if *"Courts and jurors were to dispense with a lot of the sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily."*

An editorial in the Intelligencer issue of February 2, 1948 (Rel. Ex. 31; 982a-983a) headed *"Who'll Be the Next"* referred to the current gruesome story appearing in the metropolitan newspaper describing the brutal beatings of aged men and women in their shops by holdup men. The editorial stressed that "If juries and courts will make examples of these cowardly enemies of society there will be fewer of their assaults. * * * *It would be lamentable if citizens were forced to take the punishment of them into their own hands"* (983a). (Italics supplied.)

The Intelligencer issue of February 6, 1948 (Rel. Exs. 34-35; 984a-988a) contained an article headed *"Less Power for Juries,"* under a Harrisburg dateline, and discussed a Philadelphia judge's "proposal to relieve juries of the power to fix penalties in cases involving first degree murder" on the ground that jurors "do not know how to exercise it" (984a, 985a).

The Intelligencer issue of February 10, 1948 (Rel. Exs. 36-37; 989a-991a) under the heading "Four Youths Indicted for Feasterville Murder" again reported on the front page the passion-arousing details of the crime. The article referred to the precautions taken by the four State Troopers, the sheriff, two deputy sheriffs and county detectives to keep these "trigger happy bandits" in custody while being

brought from the Bucks County Prison to the courthouse (989a, 990a).

Almost simultaneously with the indictment there appeared in the Intelligencer issue of February 11, 1948 (Rel. Ex. 38; 992a-993a) an editorial designed to arouse the passions of the readers. The editorial entitled "*Enraged Citizens*" condemned leniency by courts and juries in dealing with criminals and stated that although "*Mob law* is not the kind we want in this country * * * but there probably were thousands of women, * * *, who felt like cheering when they read that" a convicted rapist, who had been merely fined $25.00 had been "*tarred and feathered.*"

The Intelligencer issue of February 16, 1948 (Rel. Exs. 40-41, 995a-997a) carried the frontpage headlined article "Police Connect Six Bandits Arrested Here to a Number of Robberies and Holdups" and in heavy type headlined that "They Also Know Members of the Boy Murder Gang."

Another frontpage article of the same issue (Rel. Ex. 40; 994a) under the heading, "10 *Young Problems*" stressed that "Something to worry about in the way of Juvenile Delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison," and that "Four of the Boys Are Charged With Murder."

Two days later in the Intelligencer issue of February 18, 1948 (Rel. Ex. 42; 998a), an editorial appeared, headed "*Time For an Example.*" It stated that "The Overflow of Philadelphia's Young Criminals Into Bucks County Might, It seems Reasonable to Believe, Be Discouraged if the Crooks were given Sentences which would be impressive and get Headlines Large Enough to be Seen and Become Impressive. *Stiff Sentences have had that effect before.*"

The Intelligencer issue of March 1, 1948 (Rel. Ex. 43; 999a-1000a) under the heading "Charged With Murder, Asks Separate Trials," quoted Judges Keller and Boyer as preferring "to have a combination trial if possible, covering all

defendants" and as being critical of the relator's application for a separate trial on the ground that "separate trials in these cases will mean that it may take a year to dispose of the cases."

The Intelligencer issue of April 2, 1948 (Rel. Ex. 46; 1001a-1002a) contains a reprint of an editorial of the Philadelphia Inquirer, entitled "*Mild Sentence For Murder*," showing an editorial policy against leniency in murder cases and against considering each case upon the facts and law thereof.

The most inflammatory editorial is that headed: "*If Sob Sisters Lay Off*," in the Intelligencer issue of April 17, 1948 (Rel. Ex. 48; 1003a-1004a). The editorial quoted Judge Harry McDevitt, of Philadelphia, as telling three holdup men, whom he had sentenced to from 10 to 30 years, that: "You wise guys start out with guns and usually wind up in the electric chair." The editorial commented that: "Unfortunately * * * there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be time to stop making guinea pigs of the lawabiding members of society."

The editorial policy against lenient sentences appears again in the Intelligencer issue of May 7, 1948 (Rel. Ex. 49; 1005a-1006a). In an editorial headed: "*Jurors Rebuked Again*," this editorial referred to a judge in Philadelphia having twice rebuked a jury for soft-hearted decisions. It further commented that:

> "It makes it more and more apparent that untrained men and women, not familiar with court rules or the proper weighing of evidence are lacking in temperament or ability to serve efficiently."

Foster-Zeitz Trial:

The trial of relator's two companions, Foster and Zeitz, started on Monday, May 24, 1948 and ended on Friday, June 4, 1948. This trial was highly publicized in the newspapers, which were distributed throughout Bucks County —all in headlined frontpage articles.

The Intelligencer each day carried detailed accounts of all phases of the case, from the voir dire examination of the jurors, to the almost verbatim testimony of each eye witness at the Feasterville Tavern holdup, to the almost verbatim demand for the death chair by the District Attorney in his closing summation.

The news coverage of the trial was more than fair comment on what transpired in the courtroom. The articles were dramatic and passion-arousing.

The Intelligencer issue of May 24, 1948 (Rel. Exs. 55-56; 1009a-1012a) carried the frontpage feature: "Feasterville Murder Case Defendants Go on Trial." Curiously, this article again reported: "Only two of the defendants charged with the murder will go on trial this term. * * * The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court." The article referred to Foster and Zeitz having been "* * * brought into court by two State Troopers * * * other guards and Sheriff's deputies were stationed nearby * * *."

The Intelligencer issue of Tuesday, May 25, 1948 (Rel. Exs. 57-58; 1013a-1017a), again gives a play by play description of the selection of the voir dire examination of the jurors, and the names of the jurors selected were boxed on the frontpage under the heading: "KELLY MURDER JURY." This article also refers to the fact that: "Two other defendants will be tried for the same crime at a later term of court * * * David Darcy, 22, and Felix Capone, 16, also

Philadelphians." It stated the defendants were charged with holdups in Philadelphia, Montgomery and Delaware Counties and in South Jersey, in one of which holdups a Philadelphia city fireman had been shot.

The same issue of the Intelligencer (Rel. Ex. 57; 1018a) carried a frontpage article entitled: "*MERCY IS OVER-DONE*," under a Washington dateline, quoting Mr. Justice Robert H. Jackson of having accused his Supreme Court colleagues of giving hardened criminals too many chances of getting out of jail.

The May 26, 1948 issue of the Intelligencer carried another headlined frontpage article (Rel. Exs. 59-60; 1019a-1023a), and the names and addresses of the jurors selected appear in heavy block type on the front page under the heading: "Zeitz-Foster Murder Jury." The article refers to the trial of "Two *Philadelphia* Youths Charged With the Murder of William Kelly." The article referred to Judge Boyer having issued a special venire of 50 jurors to be returned the following morning, the original panel having been exhausted.

The Thursday, May 27, 1948 issue of the Intelligencer (Rel. Ex. 61; 1024a) contained a frontpage photograph headed "MURDER DEFENDANTS ON THE WAY TO COURT," with the notation: "Handcuffed to police are two Philadelphia youths on trial in the Bucks County Court House * * *." The photograph shows the defendants handcuffed to two state troopers, sheriff and deputy sheriff. The same issue (Rel. Exs. 61-62; 1025a-1030a) carried the headlined frontpage story entitled: "128 Jurors Called in Murder Trial, But Only 11 Seated," and again carried a blocked list of the "ZEITZ-FOSTER MURDER JURY." The article referred to the fact that: "The fourth day of the trial opened this morning shortly after 10 o'clock and still the case had not been opened to the jury by the Commonwealth * * *."

Much was made of the exhaustion of the second venire of the jurors and of the necessity for calling a third venire.

The Friday, May 28, 1948 issue of the Intelligencer (Rel. Exs. 63-64; 1031a-1037a) carried the headlined frontpage article entitled "JURORS VISIT MURDER SCENE, TESTIMONY IS UNDER WAY, LANDLORD IDENTIFIES THREE." The article refers to the "Trial of two members of a Philadelphia Boy-Bandit Gang that *killed a Trevose man, made a cripple out of another man for life*, and injured several others in a holdup at the Feasterville Inn last December 22." The article quotes District Attorney Biester as having "Left little doubt in the minds of those who heard him that when he makes his next speech to the jury the Commonwealth will ask for the death penalty." The article refers to Kelly (the deceased) as "A highly respected citizen of his home community * * *." The article stated that: "It took exactly 147 jurors to get the 14 required for this trial. It took 17 hours of questioning. * * *." The article carried the names and detailed accounts of the testimony of the various witnesses. One witness, John R. Naysmith, a spectator at the holdup, was reported as testifying: "I saw Zeitz and Foster in front of the bar, I also saw David Darcy there." Repeated references were made to the activities of Darcy during the holdup, including "I heard Darcy ask where the hero was that hit me * * * 'Where are the police'; I feel like shooting a couple of them" (1031a, 1032a, 1033a, 1034a, 1035a, 1036a).

The May 29, 1948 issue of the Intelligencer (Rel. Exs. 65-66; 1038a-1043a), carried the frontpage headline: "*Heard Feasterville Bandits Say They Would Also Like To Have Shot Some Cops.*" The article referred to:

> "The horror of the Feasterville's Tavern Murder during last year's Christmas Season, when an innocent outsider was fatally shot, is being related in detail again today in Bucks County Criminal Court."

"The spectacle of a quartet of wise-cracking trigger happy young bandits who invaded the Feasterville Inn last December 22, at night, shooting down patrons '*just for the fun of it*' was described from the mouths of numerous Commonwealth witnesses all day yesterday."

The article referred to "Hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later." Again the detailed testimony of the Commonwealth witnesses was given as to the passion-arousing details of the crime, wherein time and time again the name of Darcy and his conduct appeared, although Darcy was not then on trial.

The Monday, June 1, 1948 issue of the Intelligencer (Rel. Exs. 67-68; 1044a-1048a) in a frontpage article headlined: "*Why Did They Shoot Me? Murdered Man Asks After He Was Victim in Feasterville Shooting,*" starts with this passion-arousing paragraph: "Crippled for Life, a 46-year-old Philadelphian was wheeled into court this morning on an invalid chair." The article reported Hellerman as testifying that he "was playing shuffle board in a side room of the Inn when David Darcy, 22,—who will be tried later—came in and fired two shots." Repeated references were made to Darcy's conduct during the shooting. Hellerman is quoted as testifying "I have pain all of the time in my legs, I no longer have normal control of my organs. I can move my hands but not my legs."

The Tuesday, June 2, 1948 issue of the Intelligencer (Rel. Exs. 70-71; 1048a-1054a) another frontpage article headed: "Zeitz Admits Firing Two Shots Out of Auto" starts "'You ought to try this some time. * * * it's a lot of fun' a 16-year-old Philadelphia boy-bandit, remarked to patrons of Deacon's Inn near Penndel during a pre-Christmas holdup last December, less than 30 minutes after a holdup and murder at nearby Feasterville." The article referred to

the "trigger happy bandits," "four Philadelphians," including "Darcy * * * who will be tried later." The article stated: "Slowly, but carefully, the Commonwealth is leading up to the point when it will ask that the jury demand that Zeitz and Foster pay with their lives for the death of William Kelly." The article referred to Assistant District Attorney Curtin's having read an 8-page typewritten statement of all defendants to the jury. The statements mentioned that "All four defendants said everything in the statement was true." The article further refers to other holdups committed by Darcy and his companions, in one of which holdups he was referred to as having stated: "That he had just shot a couple of men at another place."

The Newtown Enterprise issue of June 3, 1948 (Rel. Exs. 109-110; 1111a-1116a) reported in a frontpage article the passion-arousing details of the crime under the headline: "Youths Escapade Ends in Murder." It referred to:

> "The sordid tale of thrill-seeking youths whose escapade ended in murder is in its second week in criminal court at Doylestown * * * of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later * * *."

This article, like the daily accounts in the Intelligencer, stressed Darcy's roll in the holdup.

The Thursday, June 3, 1948 issue of the Intelligencer, (Rel. Ex. 72; 1055a) in another frontpage article headed: "*Prosecutor's Plea*" quotes District Attorney Biester in his summation to the jury, as having declared:

> "*Morally*, these boys, Zeitz and Foster, *killed three men* the night of the Feasterville holdup" * * * "William Kelly was mortally wounded by a shot from the bandit gun, and the two others were horribly crippled,

one for life". "Even a surgeon's knife cannot restore one of the victims to normal life."

The District Attorney also emphasized the fact that the defendants' callousness was outrageous when the bandits wished the victims of a holdup, "a Merry Christmas" before leaving the Feasterville Inn shooting escapade:

> "Not satisfied with the Feasterville Affair, they went to another place the same night and held it up with guns. *What one did, was the attitude of all.*"

The same issue of the Intelligencer (Rel. Exs. 72-73; 1056a-1061a), carried another frontpage article headed: "Defense in Murder Trial Decides Not To Offer Evidence." This article stated: "* * * Sensational 30-day crime spree that ended in a murder * * *." Later in the article it is stated: "Seven shootings, one a fatal affair, during a 30-day hold-up spree, were enumerated in court as the written documents were read by Assistant District Attorney Willard S. Curtin" (1059a). The article stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone."

This article is basically incorrect inasmuch as Darcy did not participate in four of the holdups and the statements submitted clearly so state.

The Friday, June 4, 1948 issue of the Intelligencer (Rel. Exs. 75-76; 1062a-1066a) in a frontpage article headed "FATE OF ZIETZ AND FOSTER IN JURY'S HANDS," referred to the defendants as two "trigger happy Philadelphia youths" and to the "brutal killing of William Kelly."

The article gives excerpts of Judge Boyer's charge to the jury, *including a statement that* "in his opinion the death penalty is warranted in this case." Included in the excerpts of Mr. Biester's summation were his comments that these boys are "*not normal American boys*," and that "they were as brazen as they could be during this trial and during their escapades of crime."

The Saturday, June 5, 1948 issue of the Intelligencer (Rel. Ex. 78; 1071a-1072a) published and circulated—*two days before the relator's trial*—several front page articles. The featured article was headed:

> "JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO ELECTRIC CHAIR.
> Court Tells Eight Men and Four Women He Could Not See How Any Other Course Could Have Been Taken —Two Defendants Appear To Be Unmoved."

Another frontpage article of this Saturday, June 5, 1948 issue was headed "Two Young Killers Turn To Bible For Comfort" (Rel. Exs. 78-79; 1068a-1069a). This article referred to the convictions of Foster and Zeitz by a "Bucks County Jury * * * *Who wasted no time on their deliberation* before returning a verdict of guilty of murder in the first degree with death penalty recommended." This article referred to the costs of the prosecution to the county.

Another frontpage article of said Saturday, June 5, 1948 issue (Rel. Ex. 78; 1070a) was headed:

> "HELD FOR BURGLARY.
> 3 Youths Lived Near Zietz and Foster"

The article referred to the arrest of three Philadelphia youths, including Robert White, 18, and merely referred to the fact that they lived in the vicinity of an inn that was held up by the two convicted murderers, who were sentenced to death here, the preceding day.

Finally, in the same issue of Saturday, June 5, 1948,—*two days before the relator's trial started*—under the column "We Noticed" appeared two articles (Rel. Ex. 79; 1074a). The first mentioned the "thousands of dollars it cost the taxpayers to capture, try and convict just two of the *trigger happy bandits* recently convicted and sentenced to the electric chair." The second article quotes a police official as saying that: "* * * *If the killers of Kelly were not given the death sentence, the electric chair should be destroyed.* * * *and his opinion being agreed with by those who heard the statement.*"

Darcy Trial:

The Intelligencer issue of Monday, June 7, 1948 (Rel. Exs. 80-81; 1075a-1078a), which was published and circulated before the selection of any jurors, contained a frontpage article headed: "UP TO LATE HOUR THIS A. M. NO JUROR HAD BEEN GOTTEN FOR DARCY MURDER TRIAL." The article referred to the relator "Whose partners in crime * * * were found guilty last Friday and sentenced to die in the electric chair * * *" as having gone on trial that morning in Judge Keller's Court. The defendants were referred to as a "trigger happy gang." The article states:

> "From the start of the questioning of jurors this morning, it was evident that great difficulty will be met in selecting a jury.
>
> "Jurors informed the Court that they had read a lot about the case and a number said that they had 'formed a fixed opinion that could not be changed by the evidence.'"

The Intelligencer issue of Tuesday, June 8, 1948 (Rel. Exs. 82-83; 1080a-1085a) contained another frontpage arti-

cle "JUROR BEING QUESTIONED THROWS BOMB SHELL IN COURT." The article referred to a prospective juror's statement on voir dire examination that "* * * *It's the coldest blooded murder that I ever read about.*" The article referred to Darcy as a member of: "A four-team Philadelphia bandit gang that shot up the Feasterville Inn * * * and then held up the Deacon's Inn at Penndel" on December 22.

The same, June 8, 1948, issue of the Intelligencer (Rel. Ex. 84; 1086a) contained a Guest Editorial from the Philadelphia Evening Bulletin entitled "TWO MURDER CONVICTIONS." The editorial commended the Doylestown jury for not being subject to "*maudlin sympathy*" in failing to recommend the death penalty and cited the *Foster-Zeitz verdict as "a vindication of women as jurors.*"

The foregoing newspaper articles and editorials constitute convincing proof of the policy of the press to secure a death penalty in the relator's trial. They crystalized the public sentiment and indignation that existed in Doylestown and in Bucks County or June 7, 1948 when the voir dire examination of the jury panel commenced.

B.

Magazine Article.

The publicity following the Feasterville holdup on December 22, 1947 was so widespread in scope and intense and passion-arousing in nature that it culminated in a magazine article entitled: "*KILL-CRAZY*" in the June 1948 issue of a popular sensational national magazine known as "*Front Page Detective,*" (Rel. Ex. 136). This article contained a detailed account of the Feasterville holdup and murder, as well as of other holdups, in some of which Darcy

was not involved, together with the pictures of the relator and the other defendants. *The article being local in interest, was necessarily circulated and widely read throughout Bucks County* (557a-560a; 567a-575a; 589a-592a; 601a-602a). *This magazine was seen in the courtroom during the relator's trial in the hands of courtroom spectators* (557a-560a; 567a-575a; 581a-592a; 601a-602a).

C.

Radio and Television.

There was wide radio and television coverage both of the holdup and apprehension of the defendants, as well as of the Foster-Zeitz trial. Radio Station WFIL, of Philadelphia, with a broadcast radius covering all of Bucks County (281a-286a), as well as Radio Stations WBUS of Doylestown (287a-288a), and WBUX of Quakertown, carried detailed reports of the Foster-Zeitz trial. The Quakertown Free Press issue of May 27, 1948 (Rel. Ex. 123(c); 1125a-1126a) contained a frontpage article headed: "COURT NEWS POPULAR WITH WBUX LISTENERS." The same newspaper's issue of June 10, 1948 (Rel. Ex. 123(d) (e); 1127a-1128a) in another frontpage article stated:

> "The murder trials at the courthouse, Doylestown, are being covered by WBUX reporters, and at noon and evening the undertakings of the court are read over the air" (1128a).

D.

The Aforesaid Newspaper Campaign Resulted In Public Passion, Prejudice and Hysteria, Demanding the Death Penalty, Irrespective of the Evidence.

The *campaign to assure the death penalty* for these youths *was crystallized in the expressions of public sentiment* generated by said newspaper articles and editorials, as well as by the radio and television broadcasts. There was a widespread popular sentiment in all sections of Bucks County that all the defendants involved in the Feasterville holdup should be sentenced to the electric chair, *irrespective of the evidence and the law in each case*. This popular sentiment against these youths *permeated throughout the entire Bucks County* (124a-133a; 159a-179a; 181a-207a; 253a-272a; 314a-340a; 431a-473a; 585a-605a).

The relator called seven witnesses to substantiate the contention as to the public sentiment of prejudice and hysteria: *Rev. Frank J. Damrosh*, St. Paul's Episcopal Church, Doylestown, Pennsylvania (124a-133a); *Rev. William Babinsky* of Feasterville, Pennsylvania, Pastor of the Dutch Reformed Church of America (159a-179a); *G. Coe Farrier*, an attorney and former city solicitor of Philadelphia (181a-207a); *Dr. Carl J. Hoffman*, of Philadelphia, a psychiatrist (253a-272a); *Howard R. Price*, of Charlottesville, Virginia, formerly of Andalusia, Bucks County, an auto parts salesman (314a-340a); *Miss Alice Patterson*, of Margate, New Jersey (392a-419a); *Knickerbocker Davis*, Doylestown, Pennsylvania, a journalist (431a-473a); *Mrs. Inez Darcy Heckman*, a sister of the relator (585a-605a).

These witnesses, in effect, testified that the public sentiment against the relator and his companions prior to the relator's trial was that they "*should be hanged*," "*ought to be*

shot," "ought to be stamped out like bugs" (166a), *"should burn"* (188a, 203a), *"ought to be hanged,"* or *"get the chair"* (257a), "should be lynched, hanged or shot" (318a, 438a), "should burn" (394a-395a), should get the "hot seat," or should be "taken out and shot or strung up" (436a), and "did not deserve a trial" (438a, 587a), but "should be strung up" (588a).

Mr. Knickerbocker Davis, a magazine writer, and former newspaper correspondent, testified that he was interested in the problem of juvenile delinquency, and that after the Feasterville holdup on December 22, 1947, he *made an independent survey of public opinion of the crime in the Borough of Doylestown and its environs as far as New Hope*. Mr. Davis' survey showed that 70% of the 100-150 persons interviewed by him were shocked and outraged by the crime and were of the opinion that the participants deserved the death penalty (433a-435a; 438a; 441a-443a; 448a).

The public sentiment and indignation against these defendants was generated not only by the type of the crime involved, but also by the fact that the participants were Philadelphia youths who had entered Bucks County to commit the holdups with which they were charged. The newspaper articles and editorials above designated make frequent references to the fact that the defendants were Philadelphians who had made "criminal forays into Bucks County," and the popular sentiment generated by said newspaper articles and editorials reflect the public indignation against the "*outlanders*" from Philadelphia (259a, 260a, 318a, 333a-337a; 394a-396a).

E.

Relisting of Darcy Trial.

Originally the relator's trial was not scheduled to be held until the term following the trial of Foster and Zeitz. Suddenly, on June 4, 1948, at the end of the Foster-Zeitz trial, it was decided to hold the Darcy trial immediately on the completion of his companions' trial.

It is uncontradicted that both Judges Boyer and Keller were desirous of having a joint trial of all defendants in order to save time and expense. Both judges were opposed to petitions by Darcy and Capone, asking for separate trials (Doylestown Daily Intelligencer, Monday, March 1, 1948) (Rel. Ex. 43, 999a-1000a).

Thereafter, Darcy and Capone were granted separate trials, pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, Sec. 40 (19 P. S. §785).

The newspapers until Friday, June 4, 1948 reported unequivocally that the Darcy trial was not to be held during the same term of court as the trial of Foster-Zeitz. The Intelligencer issue of *Friday, May* 14, 1948 (Rel. Ex. 51; 1007a-1008a) commented: "* * * but only two will be tried during the approaching term * * * David Darcy and Felix Capone will be tried later." The Intelligencer issue of *Monday, May* 24, 1948 (Rel. Exs. 55-56; 1009a-1012a) stated that: "* * * only two of defendants charged with the murder will go on trial this term * * * Other two * * * tried at later term of court." This statement is reiterated in the issues of *May* 25, 1948 (Rel. Ex. 57; 1014a), of *May* 28, 1948 (Rel. Ex. 64; 1034a), *May* 29, 1948 (Rel. Ex. 65; 1033a), June 1, 1948 (Rel. Ex. 67; 1044a), *and June* 2, 1948 (Rel. Ex. 70; 1049a). *None of the articles mentioned that Darcy's trial was to start immediately after that of Foster and Zeitz.*

Neither District Attorney Biester, nor Assistant District Attorney Curtin, *repudiated the stories* published by the newspapers as a fact that the relator would be tried at the next term of court (795a; 897a-898a).

The Doylestown High School graduation exercises, which for years had been held in the Bucks County Court House, were rescheduled and transferred from the Court House only at the completion of the Foster-Zeitz trial, because according to the Intelligencer, Friday, June 11, 1948, (Rel. Ex. 93), "So many murder trials are cluttering up the Bucks County Criminal Docket * * *."

F

Darcy Jurors Present in Bucks County Court House on June 1, 1948 During Foster-Zeitz Trial.

The records of the Bucks County Criminal Court show that the traverse jury selected to report on June 1, 1948 did so report in the Bucks County Court House on that date (Rel. Exs. 10 (c) and (d), 949a, 952a). The jury that was summoned to appear on June 1, 1948 was not summoned specifically to serve on relator's trial, but was summoned generally to serve for the term commencing June 1, 1948 (949a). These jurors were in the court house during the Foster-Zeitz trial and, in fact, some were on that date excused from jury service (952a). These jurors certainly had the opportunity to attend the sessions of the Foster-Zeitz trial. One, talesman Slaughter, testified that in fact he had been present in court during some of the days of said trial (1143a).

G.

So Aroused Was the Public Prejudice and Hysteria That it Was Difficult to Impanel a Jury for the Foster-Zeitz Trial.

The public prejudice and hysteria against the youths involved in the Feasterville holdup was rekindled and intensified with the *efforts to impanel a jury to try the case against Foster and Zeitz.* The Bucks County Criminal Court records indicate that the original jury panel summoned to serve on this case was exhausted before a jury was selected (Rel. Exs. 10(a)-10(g)). The Court thereupon directed that a *special venire* be issued, and the Sheriff summoned and returned from the bystanders and the county at large 50 qualified persons (Rel. Ex. 10(g)-10(h)). Thereafter, the Court found that, by reason of challenges and otherwise, *both the original panel of 120 jurors and the additional panel of 50 jurors had been exhausted without a jury being selected.* The Court thereupon issued *another order* directing the Sheriff to summon from the bystanders or from the County, 25 additional persons which he promptly did (Rel. Ex. 10(g)-10(h)). *142 persons were examined before a jury of 12 jurors* and two alternates were finally selected to serve on the Foster-Zeitz trial (Rel. Ex. 10(k)).

H.

The Public Prejudice and Hysteria Rekindled During the Foster-Zeitz Trial Became Intensified During the Selection of the Darcy Jurors.

The Feasterville holdup naturally aroused great public indignation throughout Bucks County. The atmosphere of

prejudice and hysteria resulting grew in intensity and reached its climax during the selection of the jurors to serve on the relator's trial, *so that before the jury was even selected the relator was prejudged guilty and deserving of the death penalty. It was impossible for the Commonwealth to isolate the jury panel from which the Darcy trial jury was selected from the highly publicized Foster-Zeitz trial.* As stated, the Criminal Court records of Bucks County show that this jury panel *appeared in the court house on June* 1, 1948, and that they had the best available opportunity to hear and observe that case.

In fact, one talesman, Harry T. Westlake, when asked whether he had formed an opinion as to the relator's guilt or innocence, threw a "*bombshell*" into the courtroom when he stated, in the presence of three other jurors who had already been selected for service, that:

> "* * * *It is one of the most cold-blooded murders I ever heard of*" (Rel. Ex. 5A; 1141a-1142a).

According to the record of voir dire examination of prospective jurors in the Foster-Zeitz trial, 142 jurors were examined on May 24, 25, 26 and 27 before the jury was completed. 80 jurors were examined on the voir dire examination in the Darcy trial on June 7 and 8, 1948 before the jury was completed. *In short, a total of 222 jurors were examined on voir dire examination in both trials before the juries were completed.* Both juries were selected from all sections of Bucks County and reflected the public sentiment of their respective sections.

(a)

Analysis of Voir Dire Examination.

An analysis of the voir dire examination of the jurors called for the Foster-Zeitz case shows:

Foster-Zeitz Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	142	142	142
Not asked question—	52	62	64
Asked question—	90	80	78
Answered No—	32	48	62
Answered Yes—	58	32	16
Percentage of those asked answering yes—	63%	40%	20%

An analysis of the voir dire examination of the jurors called for the Darcy case shows:

Darcy Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	80	80	80
Not asked question—	21	36	25
Asked question—	59	44	55
Answered No—	7	22	39
Answered Yes—	52	22	16
Percentage of those asked answering yes—	89%	50%	30%

An analysis of the voir dire examination of the jurors called for both cases shows:

	Read Newspapers	Discussed Case	Fixed Opinion
Foster-Zeitz Jurors	63%	40%	20%
Darcy Jurors	89%	50%	30%
Change between trials	26%	10%	10%

Thus, in the relator's trial, approximately one-third of the jurors called to try him who were asked the question whether they had fixed opinions, stood up in open court and said that they had fixed opinions, derived from reading newspapers and hearing the case discussed. An examination of the testimony taken on voir dire examination in the relator's trial reveals a remarkable increase in intensity and fixity of opinion—*the crystallization of public sentiment against the relator was apparent.*

I.

Judge Boyer's Excessive Interest, Attendance and Participation in the Relator's Trial Deprived him of a Fair Trial and Constituted a Denial of Due Process.

Judge Calvin S. Boyer, who presided at the Foster-Zeitz trial, evidenced his personal antagonism and hostility against all of the defendants—at least from the date of the presentation of relator's petition for severance.

The Intelligencer issue of Monday, March 1, 1948 (Rel. Ex. 43; 999a-1000a) quoted Judge Boyer and Judge Keller as commenting that:

> "Separate trials in these cases will mean that it may take a year to dispose of the cases."

After the Foster-Zeitz verdict, the Intelligencer issue of Saturday, June 5, 1948 (Rel. Ex. 78; 1071a-1072a) quoted Judge Boyer as praising the jury for its verdict condemning the "two killers to electric chair."

The Intelligencer issue of Saturday, June 12, 1948 (Rel. Exs. 94-95; 1094a-1096a) under the heading on the front page:

"JUDGE BOYER WARNS THAT BUCKS COUNTY IS TIRED OF THIEVES FROM PHILADELPHIA"

and the sub-heading headed:

"Court Warns Youth That County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers Who Were Sentenced to Electric Chair."

quotes Judge Boyer as asserting that:

> "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched * * * What business did you have to come up here in the first place?"

Judge Boyer's comments were made in connection with the sentencing of an 18-year-old Philadelphian, Robert White, who had pleaded guilty to stealing a car radio. He is quoted as having further stated:

> "We in Bucks County are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it" (1094a, 1095a).

The foregoing newspaper articles characterized his antagonism and prejudice against all the youths involved in the Feasterville Tavern holdup.

His antagonism was crystallized in the editorial which

appeared in the Intelligencer issue of Thursday, June 17, 1948 (Rel. Ex. 105; 1103a-1104a) under the heading: "*RAUS MIT 'EM.*" Apparently, the newspaper recognized the significance of "Judge Calvin S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks County or take the consequences." The editorial continued:

> "The warning has been given before, but not under such impressive circumstances.
>
> "At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many young crooks who have operated in the county.
>
> * * *
>
> "The conviction of the three young men for a wanton and unprovoked murder * * * and the imposition of the death sentence * * * together with Judge Boyer's warning * * * it is hoped will cause bandits and killers to steer clear of the county.
>
> "Getting tough has worked that way in other instances."

This editorial recognized that the verdict was an indication of not only Judge Boyer's personal sentiments but also of other Bucks Countians "* * * that leniency has merely been taken as an indication of weakness * * *".

Mr. Knickerbocker Davis testified that during the Foster-Zeitz trial Judge Boyer had told him that he thought the defendants were "hardened" and "callous criminals" (446a-448a).

Judge Boyer's attendance and participation at Darcy's trial must be taken into consideration with his expressed personal sentiments—a deep-seated antagonism and prejudice against "outlanders" and killers. The records of the

Bucks County Criminal Court indicate that, although Judge Keller did not participate in any phase of the Foster-Zeitz trial which had been presided over by Judge Boyer, that Judge Boyer actively participated, together with Judge Keller, in the relator's trial.

During the relator's trial, Judge Boyer appeared in the courtroom, together with Judge Keller, when the case was called for trial on the mornings of June 7, 8, 9, 10, 11, 12 and 14, 1948, as well as at all afternoon sessions (Rel. Ex. 115(c); 1117a-1119a). That Judge Boyer appeared on the bench at the beginning of all morning and afternoon sessions of Darcy's trial was not contradicted but was corroborated by the respondents' witnesses (312a, 362a, 379a). Moreover, it was corroborated by the Criminal Court records.

In addition to sitting on the bench with Judge Keller at the beginning of each session, Judge Boyer, at relator's trial, appeared at different times as a spectator in the court room. On two occasions he sat in a chair in the section reserved for attorneys where he could be plainly seen and observed by the jury (479a, 486a, 488a, 599a, 515a-517a, 535a, 541a, 542a-545a, 556a, 592a-593a, 613a, 617a, 628a, 727a-728a, 875a-876a, 911a; Rel. Exs. 113, 119 and 135; 1120a, 1121a and 1131a). This fact is not contradicted by the respondents' evidence. So great was Judge Boyer's interest in the outcome of this case that he sat as a spectator in the courtroom in the section reserved for attorneys during the evening session held on Friday, June 11, 1948, for the entire session, which lasted about two to two and one-half hours (487a-489a).

Further, during the Darcy trial, not only did Judge Boyer sit on the bench with Judge Keller at the beginning of each session, but on certain occasions he remained throughout the session, and on other occasions he left and then returned to the bench. On the occasions he sat on the bench with

Judge Keller, he assisted and conferred with him in the conduct of the trial of the relator and participated in various rulings, particularly regarding the admissibility of evidence (488a, 499a-501a, 540a-542a, 592a, 605a, 612a, 619a-622a, 625a, 781a, 875a-876a, 906a-907a).

It is also uncontradicted that at the session held on Saturday, June 12, 1948, Judge Boyer actively participated in the ruling of admissibility of a joint confession made by all the defendants. This question admittedly involved a difficult evidentiary problem. As a result of the ruling, the jury was permitted to take into consideration parts of the written statements of the defendants wherein Darcy admitted participation in other holdups. When Mr. Achey, the relator's counsel, objected to the offer, Judge Boyer imposed: "That applies only to cross-examination" (Rel. Ex. 5E, 1144a-1146a). Although Mr. Achey objected to Judge Boyer's participation and although Judge Boyer thereafter withdrew from the bench, the fact and effect of Judge Boyer's participation in the foregoing ruling was observable by both the spectators and jurors (479a, 535a, 541a, 612a, 781a-782a, 784a, 884a, 909a-910a). The impact of Judge Boyer's participation on the jury was necessarily great, because soon after this ruling the Commonwealth closed its case and the defense offered no evidence.

To climax Judge Boyer's extraordinary interest and participation in relator's case were the events of Monday, June 14, 1948. During Judge Keller's charge to the jury, Judge Boyer was seated in the section of the court room reserved for attorneys. Next to him was seated District Attorney Biester. Both Judge Boyer and Mr. Biester were seated so that they were plainly observable by the jurors (481a, 517a, 542a-544a, 546a-548a, 612a-613a, 628a-629a).

Towards the close of the Court's Charge, Judge Keller inquired of counsel for the Commonwealth and for the defense whether the Court had overlooked anything and

whether there were any corrections to be made (Rel. Ex. 5E; 1146a-1150a). Mr. Achey, defense counsel, answered that he had nothing to add (1148a). The Court thereupon resumed its Charge. At this point, Judge Boyer, who was seated next to District Attorney Biester, handed the latter a note. Mr. Biester read the note, then arose from his chair and approached the bench where Judge Keller was concluding his Charge. Mr. Biester succeeded in attracting Judge Keller's attention and stated:

> "I may have misunderstood part of your Charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree," (1149a).

Judge Boyer's participation and assistance in the District Attorney's correction of Judge Keller's instruction to the jury was observable by both the spectators and jurors in the court room (481a-487a, 505a-506a, 516a-523a, 542a-544a, 548a-554a, 559a, 612a-616a, 626a-629a).

Judge Boyer's attendance and participation at relator's trial—both when he sat on the bench with Judge Keller and also on the occasions when he sat in the section reserved for attorneys (especially on the Friday evening session of June 11, and the Monday, June 14 session)—was observable by the jurors and was a constant reminder to them of the Foster-Zeitz trial and Judge Boyer's praise to the Foster-Zeitz jury for their services in having rendered verdicts of guilty with death penalties. Judge Boyer's attendance and active participation was not affirmatively contradicted by the respondents.

J.

Respondents' Evidence.

The respondents' evidence, which was, in effect, adopted by the District Court and the court below, did not attempt to contradict these facts: (1) that there was newspaper publicity and editorials concerning the Feasterville Tavern holdup, as shown by the relator herein; (2) that there were public expressions of indignation as testified to by the seven witnesses called by the relator; (3) that there was widespread newspaper publicity and radio broadcasts of the Foster-Zeitz trial; (4) that Judge Boyer, both before, during and after the relator's trial displayed his personal feelings against these defendants; (5) that relator's trial was originally scheduled to start at the term following the Foster-Zeitz trial and was only re-scheduled to commence immediately thereafter during the last days of the first trial; (6) that, according to the Criminal Court records, the jury panel from which the relator's jury was drawn, appeared in the court house during the Foster-Zeitz trial and had the opportunity to attend and listen to it; (7) that the voir dire examination in relator's trial showed a marked increase in fixed opinions of the jury, so that almost *one out of every three jurors* asked the question admitted he had a fixed opinion in the case; (8) that Judge Boyer did sit both on the bench and in the courtroom almost daily throughout relator's trial and did participate in at least one ruling on the most vital question in the case. The respondents' evidence did not counter-act the cumulative effect of all the foregoing factors on the trial of the relator —the effect being of such a nature that his guilt and the death penalty which he eventually received were both prejudged by the jury.

In short, the respondent through its evidence—Judge Keller's certificate (Resp. Ex. 5; 1133a-1140a), District Attorney Biester, and Assistant District Attorney Curtin, the various tipstaves, state troopers, Doylestown police and jail wardens—was designed to establish two factors: (1) the decorum of the trial itself, and (2) the segregation of the jury.

7.

ARGUMENT.

I.

The failure of the State Court in a capital case *sua sponte* to change the venue or to continue petitioner's trial, where the case had been prejudged by the citizens of the county due to local newspaper campaign designed to secure death penalty and where the trial was suddenly scheduled to start after end of companions' trial imposing death penalties, violated the due process clause of the Fourteenth Amendment.

A

The Public Prejudice and Passion, Engendered by Out of Court Newspaper Campaign, Dictated the Imposition of the Death Penalty by the Jury Just as Effectively and Forcefully as the Physical Presence of a Mob or the Threat of Mob Violence.

The rights here violated are of the kind which this Court has always been diligent to protect. Whether federal,

guarantees of the sort here involved have been violated is a question which this Court has consistently determined itself by independent examination of the record: *Cassell vs. Texas*, 339 U. S. 282 (1950); *Haley vs. Ohio*, 332 U. S. 596 (1948); *Malinski vs. New York*, 324 U. S. 401 (1945).

The Fourteenth Amendment prohibits the conviction "* * * of one whose trial is offensive to the common and fundamental ideas of fairness and right": *Betts vs. Brady*, 316 U. S. 455 (1942); *Buchalter vs. New York*, 319 U. S. 427, 429 (1943); *Rochin vs. California*, 342 U. S. 165, 169 (1952).

As stated by Biggs, Chief Judge, in his dissenting opinion:

> "* * * The judicial process under which Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. * * * By editorials, news stories and comments, the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications" (p. 101).

The majority opinion relative to petitioner's claim that he was tried in an atmosphere of prejudice and hysteria clearly shows that the majority had mental reservations in their holding that the relator's trial at the time and place in question was not a denial of due process.

The following factual findings, which the majority made on the score of the circumstances prior to and during the trial itself (aside from Judge Boyer's presence in the courtroom and participation during Darcy's trial), would have substantiated a conclusion that relator's trial at the time and place in question was a denial of due process under the Fourteenth Amendment:

> "* * * (Relator has relied upon) the daily newspaper accounts and editorial comments published in the

community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial."

"The evidence * * * indicates that during the two weeks immediately preceding relator's trial, the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators."

"* * * The evidence makes it very probable that they (the jurors) also know that he (Judge Boyer) had just completed the trial at which relator's co-defendants had been convicted and sentenced to death."

"* * * But another judge of the same Court, Hon. Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict."

"* * * The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions * * *" (pp. 82, 83).

Despite these significant and critical findings and despite the uncontradicted evidence as to the increased fixity of opinion as to Darcy's guilt as evidenced by the voir dire examination, the majority of the Court below concluded that it was not convinced "* * * that failure to follow the 'wiser course' was a denial of the essence of fair trial" (p. 82).

The majority's conclusion that relator was not tried in a community, so aroused against him that a fair trial was

impossible, was based upon the misapplication of two legal principles: (1) that *Frank vs. Mangum*, 237 U. S. 309 (1915); *Moore vs. Dempsey*, 261 U. S. 86 (1923), and *Powell vs. Alabama*, 287 U. S. 45 (1932), warrant a conclusion that one was tried in a community so aroused against him that a fair trial was impossible *only* where there is proof that physical presence of a mob or a threat of mob violence has dominated a criminal trial; and (2) that the fact that relator was afforded the right of voir dire examination necessarily nullified his claim that he was tried in an atmosphere of prejudice and hysteria.

The rationale of *Moore vs. Dempsey*, 261 U. S. 86, which requires that a defendant be afforded a trial free from mob domination and from passion and prejudice, can usually be satisfied in only one of two ways, should such an atmosphere exist where and when the trial *is* scheduled,—by a change of either the time or the place of trial.

When the record discloses that local newspapers printed inflammatory stories and articles between the date of the crime and the date of his companions' trial; that for two weeks during the trial of his companions, the newspapers printed inflammatory accounts thereof; that the trial judge in the first case publicly praised the jury for having imposed the death penalties; that the public prejudice and passion were rekindled and intensified by the news accounts of the first trial; *then* passion and prejudice have reached a stage, from which they should be permitted to subside by the passage of time, before holding a trial for the crime which precipitated the newspaper campaign and passion and prejudice in the area in which they occurred.

In *Shepherd vs. Florida*, 341 U. S. 50, the respondents attempted to establish that the violence and attendant passion were isolated from the trial by space and time. They asserted that all the violence occurred far from the court house, and that by the time of the arraignment, on August

12, the whole of the county was so quiet and peaceable that the petitioners remained there until the trial on September 1 "without the slightest untoward incident being revealed by the record."

The Supreme Court, in the *Shepherd* case, in effect, found that this prejudicial atmosphere—engendered by inflammatory newspaper publicity that reached into every corner of the county—had not subsided by the time of trial. *The fact that defendants could be safely imprisoned within the county was but the slightest evidence of a healthy attitude* —contradicted by the Court's special order compeiling the search of persons and property entering the courtroom, and continuous newspaper publicity.

Likewise, in the instant case, the mere fact that the trial was conducted with dignity and decorum, without any hostile congregation or demonstration, without the courtroom having been crowded and with the precautions having been taken for keeping the jury under strict guard—does not necessarily warrant a conclusion that the trial was not held in an atmosphere of prejudice and hysteria.

The Supreme Court has recognized that violence is not so easily replaced by calm. See *Milk Wagon Drivers Union vs. Meadow Moor Dairies, Inc.*, 312 U. S. 287 (1941), in which the court stated:

> "* * * In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful * * *" (p. 294).

It is submitted that the inflammatory and prejudicial articles and editorials of expressions of public passion and prejudice against Darcy and the increase in fixity of opinion permeated the relator's trial and contaminated it as much as if there had been evidence of the physical presence of a mob or a threat of mob violence.

An examination of the newspaper articles and editorials shows t' ·t the newspapers' reporting of the crime and of the Foster-Zeitz trial was not factual and that the editorials were not fair comment (953a-1116a, 1123a-1130a).

A. Russell Thomas, reporter for the Daily Intelligencer, when questioned relative to the statement in the article in the December 26, 1947 issue (Rel. Exs. 16-17, 964a-966a)—that "the general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the bandits to trial, and that it is a 'break' for society at large to have the trial in Bucks County rather than in Philadelphia" testified that the report had been "editorialized" by the front office (428a).

The newspaper articles show an attempt to dramatize the crime and the trial, obviously to prejudice the readers against these youths. The characterization of the four defendants as "bandits", "thugs", "holdup men", "all Philadelphians", "gunmen" time and time again in the newspaper article does not reflect factual reporting. The reference to Kelly as "a popular citizen" (Rel. Ex. 21; 972a), and as a "highly respected citizen" (Rel. Ex. 63; 1032a) was not factual reporting but obviously an attempt to prejudice the readers against these defendants. The statement that the defendants "morally killed three men" (Rel. Ex. 72; 1055a) is not factual reporting, but was obviously an attempt to prejudice the readers. The reference to the defendants' "sensational 30 day crime spree * * * during which seven persons (were) shot (and) (1) murdered and 9 places held up by 4" (Rel. Exs. 72 and 73; 1056a, 1059a) is not factual, but an attempt to prejudice the readers. The reference to the defendants as "callous" and "gangsters" and "gun toters" (Rel. Ex. 20; 970a) is at most overdramatized reporting and effective propaganda.

The following dramatic descriptive words are found in the newspaper accounts of the crime and trials: "quartet of

armed bandits", "shot three men" (Rel. Ex. 12; 953a); use of the word "bandits" 15 times and the word "thugs" 5 times in one article (Rel. Ex. 13; 955a-958a); "all Philadelphians" (Rel. Ex. 14; 959a); "gunmen", "holdups" "shoot it out" "bandits" (Rel. Exs. 14-15; 959a-963a); "four way murder case", "young Philadelphians", "bandits", (Rel. Exs. 16-17; 964a-966a); "bandits" "Philadelphians" "wild chase", "shot their way out" (Rel. Exs. 18-19; 967a-969a); "potential killers", "callous shooting", "trigger happy bandits", etc. (Rel. Ex. 20; 970a); "thugs", "trigger-happy bandits" (Rel. Ex. 21; 972a); "hardboiled", "wise cracking", etc. (Rel. Ex. 65; 1038a); "morally killed three men", "callousness", "outrageous" "escapade" "sensational 30 day crime spree" (Rel. Exs. 72-73; 1055a-1056a); "bravado", "killers", "Philadelphians" (Rel. Ex. 78; 1068a). The foregoing are only a few examples of the non-factual and overdramatic descriptive words used by the newspaper in reporting the crime in the Foster-Zeitz trial.

Likewise the editorials showed the newspaper policy designed to secure the death penalty for these defendants (Rel. Exs. 20, 22, 31, 42, 48, 49, 84, 90, 105; 970a, 974a, 982a, 998a, 1003a, 1005a, 1086a, 1093a, 1103a). An examination of the editorials discloses that the newspapers criticized the leniency exercised by jurors and even condoned *mob law*. None of the editorials even leaves to the juror's discretion the determination of the guilt or innocence of a defendant or the penalty to be fixed.

The following entitled editorials demand convictions and the stiffest penalties, irrespective of the evidence and the applicable law in each case:

"FAST POLICE WORK" (970a-971a);
"ERRORS OF JURORS" (974a-975a);
"WHO'LL BE THE NEXT?" (982a-983a);
"TIME FOR AN EXAMPLE" (998a);

"JURORS REBUKED AGAIN" (1005a-1006a); and "RAUS MIT 'EM" (1103a-1104a).

Further proof that the newspaper reports of the crime and the Foster-Zeitz trial were not true and accurate but were inflammatory and prejudicial is seen in the Intelligencer issue of Thursday, June 3, 1948 (Rel. Exs. 72-73; 1056a-1061a). There, in a frontpage article headed "Defense in Murder Trial Decides Not to Offer Evidence," it is stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone."

This article is incorrect inasmuch as it is uncontradicted that Darcy did not participate and was not involved in four of such holdups. The confessions admitted in evidence in the Foster-Zeitz trial clearly show that Darcy was not a participant. Only three of the seven confessions were received at the relator's trial and upon objection by defense counsel that part pertaining to one holdup, in which the relator was not involved, was excluded with cautionary instructions. (See Opinion Denying Petition, Footnotes 15 and 16 (1203a-1204a).)

This example of incorrect newspaper reporting recalls a similar occurrence in *Shepherd vs. Florida*, supra. There newspaper men testified that the sheriff told them that petitioners had confessed and that they published this fact in their newspapers. The alleged confessions were not introduced in evidence, but, as here, news of the alleged confessions was widely published. This Court sharply criticized such unrepudiated newspaper reporting. In the instant case, 89% of the jurors examined and asked the question

testified that they had read of the case in the newspapers. Certainly, there is nothing on the record to show that the grossly false statement in said article had ever been corrected.

The atmosphere of prejudice and hysteria demanding execution of the death penalty for the relator existing at the time of his trial continues to the present date as evidenced by the recent newspaper articles in the Philadelphia newspapers. These articles are corroboration of such prejudice, according to Mr. Justice Holmes' Opinion, in *Moore vs. Dempsey*, 261 U. S. 86, 90, 43 Supreme Court 265, 266, that

> "The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor about a year later earnestly urging him not to interfere with the execution of the petitioners."

It is further uncontradicted that the foregoing newspaper campaign resulted in widespread antagonism against petitioner in Bucks County. Public prejudice against the defendants grew in such intensity from the date of the holdup that it amounted to an atmosphere of hysteria and prejudice reaching its climax at the Darcy trial. Relator called the following seven witnesses who testified that the general feeling in Bucks County against these defendants was that they "should have no leniency", "ought to be hanged", "ought to be shot", "stamped out like bugs", "they ought to get the chair", "should burn", "they should be given Bucks County justice", "lynched", "see them taken out and shot", "like to see them strung up", "don't deserve a trial", "they haven't got a chance in Doylestown because they hate Philadelphia boys and they were very bitter": Rev. A. Damrosch, of St. Pauls Episcopal Church, Doylestown (130a-131a); Rev. Babinsky, of the Dutch Reformed Church of America, Feasterville (160a-166a); Coe Farrier,

an Attorney (187a, 188a, 202a, 206a); Dr. Carl J. Hoffman (257a-260a, 267a); Howard Price (317a-319a); Knickerbocker Davis (436a-437a); Mrs. Inez Darcy Heckman, Darcy's sister (587a-589a); and Miss Alice Patterson (Zeitz' aunt) (394a).

Darcy's trial commenced on June 7, 1948, in spite of the passion and prejudice that had been aroused against him by the tremendous amount of newspaper articles and editorials of an inflammatory character that reached a climax during the Foster-Zeitz trial.

B.

Darcy's Trial Was Rendered Unfair and the Severance Theretofore Granted Made Worthless by Being Suddenly Advanced to Start after End of Companions' Trial and after Trial Judge Therein Had Publicly Praised Jury for its Imposition of Death Penalties.

Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, 19 P. S., 785. The rationale for such severance was that he should be fairly tried in a public tribunal free of "prejudice, passion, hysteria and tyrannical power".

The majority's findings that the situation "certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community * * *", (p. 82), is most significant on this score. The majority thereby recognizes that the severance theretofore granted Darcy was rendered worthless, when his trial was proceeded with only three days after that of Foster and Zeitz.

As stated by Biggs, Chief Judge, in his dissent:

"Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness" (p. 101).

The only reason that can be attributed for the sudden rescheduling of the Darcy trial is that the Bucks County Court, during the Foster-Zeitz trial, came to the conclusion that public prejudice against all defendants was such that death penalties could be secured. The overwhelming weight of evidence is that Darcy's case was originally scheduled for the term following the Foster-Zeitz trial, and then was suddenly advanced to follow immediately thereafter. The newspaper reports of the prospective dates of the respective trials was never repudiated by the District attorney's office. All newspaper reports prior to June 4, 1948 are consistent in stating that the cases of relator and Capone would be tried at a later term of court (Rel. Ex. 51; 1007a; Rel. Ex. 55; 1009a; Rel. Ex. 64; 1034a; Rel. Ex. 65; 1038a; Rel. Ex. 70; 1049a).

It is most significant that the *first date* that the newspapers reported the Darcy trial was to start immediately after the close of the Foster-Zeitz trial was in the Intelligencer issue of Friday, June 4, 1948 (Rel. Ex. 76; 1066a). It is only natural to infer that the only reason for the change in plans was that the District Attorney's office on Friday, June 4, 1948 was convinced that it had the Bucks Countians in a convicting and "electric chair" frame of mind, and that it would be expedient to dispose of the Darcy case at once, before the atmosphere of hysteria and prejudice and public indignation died.

Another reason for the sudden rescheduling of petitioner's trial is that the District Attorney's office knew that the jury panel, from which petitioner's jury was to be selected, had been present in the courthouse during the Foster-Zeitz trial and, therefore, had the opportunity to listen to or hear

of the details of the Feasterville holdup. The Bucks County Criminal Court records clearly show that on June 1, 1948 the traverse jurors summoned to appear on that date: "All answered to their names but the following * * *" and then there are listed the names of 40 jurors who did not then answer for service (Rel. Ex. 10 (c) and (d) 948a-952a). It is admitted that talesman Slaughter was present during several sessions of the Foster-Zeitz trial (1143a-1144a).

The analysis of the voir dire examination of the jurors who served in relator's case and were asked the questions shows that 89% of those asked admitted that they had read pertinent newspaper articles, 50% of those asked admitted that they had discussed the case, and 30% of those asked, or *one out of every three*, admitted that they had fixed opinions and were excused by the trial judge because they had formed opinions which they could not change. This analysis shows an increase of 26% over the number of jurors in the Foster-Zeitz case who had been asked whether they had read pertinent newspaper articles and admitted that they had, a 10% increase over the number of Foster-Zeitz jurors who had been asked whether they had fixed opinions and admitted that they had.

This case falls within the evils of public prejudice and hysteria discussed in *Commonwealth vs. Karmendi*, 328 Pa. 321 (339). There, of the 39 prospective jurors on the regular panel, 11 were excused because they had formed opinions which they could not change. Of 41 talesmen who were examined before the jury was completed, 13 were excused for the same reason. Approximately one-third of the jurors called to try the defendant stood up in open court and said they had fixed opinions derived from reading the newspapers and hearing the case discussed which they could not and would not change. Justice Drew, commenting thereon, stated at page 339:

"The examination of the testimony taken on voir dire reveals a remarkable fixity of opinion; the crystallization of public sentiment is apparent."

In view of the pressure to try the Darcy case immediately after the Foster-Zeitz case had closed with the electric chair penalty, while the newspaper and radio publicity and public indignation were still fresh in the minds of Bucks Countians, there could be no question but that the verdict in the relator's case was a foregone conclusion and that he was already prejudged. All the circumstances leave but one inference; that is, when relator's trial started on Monday, June 7, the prevailing opinion in Bucks County was that "Darcy is guilty and he must receive the electric chair."

The majority's conclusion condemns appellant for his trial counsel's failure to move for change of venue or continuance, although in its previous per curiam opinion (203 F. 2d 407, 409) it had sustained the action of the District Court in denying the petition for habeas corpus based on the objection that Darcy was deprived of due process by reason of the lack of effective assistance of counsel.

Neither of the decisions cited by the court below as authority for its position that significance must be attached to the fact that at no time did relator ask for a change of venue is applicable: *Stroble v. California*, 343 U. S. 181 (1952); *United States v. Rosenberg* (C. A. 2), 200 F. 2d 666 (1953). First, as stated hereinbefore, relator was not permitted to explain that he himself had not waived the right to ask for a change of venue or for a continuance because the court below in its earlier decision (203 F. 2d 407, 409) had excluded any testimony showing the lack of effective assistance of counsel. Secondly, in the *Stroble* case more than two (2) months elapsed between the alleged inflammatory newspaper articles and the date of [redacted]

berg case there were no news items whatsoever concerning the pending prosecution between November 1950 and February 21, 1951, the date of the trial—a period of three (3) months.

In the Darcy case, the trial started only two (2) days after two (2) weeks continuous publication of inflammatory newspaper articles about the Foster-Zeitz trial, wherein Darcy's name was daily mentioned. In any event, as stated in the *Stroble* case (at 193-194), petitioner's failure to make such a motion was not dispositive of the issue here. Petitioner herein has shown how the publication of the news of the Foster-Zeitz trial for two (2) weeks immediately preceding his trial prejudiced the jury in arriving at their verdict. Clearly, newspaper accounts of his companions' trial rekindled public prejudice in his case and aroused to an even higher degree such prejudice in the community that petitioner's trial was "fatally infected" with an absence of "that fundamental fairness essential to the very concept of justice". *Lisenba vs. California*, 314 U. S. 219, 236.

Nevertheless, the majority herein have concluded that "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, * * *". In its opinion, the majority further commented as to relator's original counsel: "And he did not at any time ask for a change of venue * * *" (pp. 81, 82).

The Court's findings and conclusions, relative to the issue of effective assistance of counsel, are, to say the least, contradictory and inconsistent.

In its earlier opinion, the Court below excluded any proof in support of its contention as to lack of effective assistance

of counsel. Now, in attempting to justify their conclusion that relator received a fair and impartial trial, the majority state that the trial counsel "* * * was sufficiently satisfied with the responses of these veniremen * * * And he did not at any time ask for a change of venue" (p. 81).

It is submitted that the relator should not be penalized for his trial counsel's failure to request a change of venue or continuance and that the trial court sua sponte should have granted such change in time or place.

If, however, the failure of the relator's trial counsel to act becomes essential and controlling, then the relator should have been permitted to offer testimony in regard to such lack of effective assistance of counsel.

It is, therefore submitted that the trial of petitioner, starting in an atmosphere of prejudice and hysteria and started reaching its climax during the Foster-Zeitz trial was but a sham and a farce and constituted a denial of due process of law.

II.

The "extraordinary and unprecedented conduct" of Judge Boyer, a judge other than the trial judge in petitioner's trial, who acted as an "overseer judge" and judicial aid to the district attorney and was "known" by the jury as "hostile" to petitioner, deprived petitioner of a possible unprejudiced determination as to the penalty to be imposed—whether death or life—and, therefore, violated, the due process clause of the Fourteenth Amendment.

A.

The Recognition by the Majority of the Court below that Judge Boyer's Conduct Amounted to a "Rather Striking Manifestation of Extraordinary Interest in the Proceedings" and, also, that the Jury Identified him as "Hostile" to Darcy Established that Judge Boyer "Had Done Something Prejudicial" to Petitioner, Resulting in a Denial of Due Process.

Under Pennsylvania law, the jury fixes the penalty in first degree murder cases—death or life imprisonment (18 P. S., 4701).

Judge Boyer's extraordinary and unusual manifestation of interest and active partisan participation in petitioner's trial had a terrific impact on the jury's fixing Darcy's penalty at death, rather than at life imprisonment.

The majority opinion in the court below squarely recognizes the fact that Judge Boyer showed an extraordinary and unusual interest in Darcy's trial. The uncontradicted facts of Judge Boyer's presence and participation were so obvious that they could not be and were not overlooked by the majority.

Obviously, the reason for the indelible impression made upon the majority by Judge Boyer's role in this case was that it was most unusual and extraordinary for another judge to be so actively present—let alone participate—in a trial, in which he did not preside. Nowhere in the records has there been found another example of a "two-judge" bench in a criminal or civil trial.

If the fact of Judge Boyer's "extraordinary interest" in Darcy's case made such a lasting impression upon the majority as set forth in the Opinion, then the tremendous impact of his presence and participation must have made an even more effective impression upon the minds of the jurors in the Darcy case.

The effect of the impact of Judge Boyer's role in this case upon the jurors is that his hostile attitude against Darcy was the decisive force in the determination by the jurors of the only issue left to them under Judge Keller's charge—whether to impose imprisonment for life or death as the penalty in this first degree murder case, as provided under Pennsylvania law (18 P. S., §4701).

Judge Boyer's conduct in the Darcy trial is most ably analyzed by Kalodner, Circuit Judge, in his dissenting opinion (pp. 85-101).

The majority has, at least by inference, recognized that Judge Boyer's conduct during the Darcy trial was a "dubious occurrence" in State procedure which they would proscribe if it should have happened in a Federal Court.

However, this is not the test as to whether or not there has been a violation of the due process guarantee, as set forth in *Betts vs. Brady*, 316 U. S. 455 (1942), *Johnson v. Zerbst*, 304 U. S. 458 (1938), and *Rochin v. California*, 342 U. S. 165, 172 (1952).

The test as stated in *Chambers v. Florida*, 309 U. S. 227 (1940) is:

"* * * No man's life, liberty or property, (can) be forfeited as criminal punishment * * * until there has been a charge fairly made and fairly tried in a public tribunal *free* of prejudice, passion, excitement and *tyrannical power* (pp. 236-237)."

Upon consideration of the "totality of facts", evidenced by the majority's admitted factual findings as to Judge Boyer's conduct in the Darcy trial, it is obvious that the relator's trial was offensive to the common and fundamental ideas of fairness and righteousness and that his conviction was in violation of the due process clause of the Fourteenth Amendment.

(a)

JUDGE BOYER'S PERSONAL FEELING OF PREJUDICE AGAINST RELATOR AND COMPANIONS.

Judge Boyer, by his conduct and by his statements in court, evinced a personal antagonism and indignation against the boys from Philadelphia who had made raids into Bucks County. The first expression of his sentiments is found in the Intelligencer issue of March 1, 1948, when both Judges expressed their objection to separate trials (Rel. Ex. 43; 1000a). This statement shows a deliberate attempt to hurry the trial of these homicide cases.

Thereafter, after the Foster-Zeitz jury returned its verdict of guilty of first degree murder, with the death penalty, the Intelligencer issue of June 5, 1948 (Rel. Ex. 78; 1071a-1072a), made the following frontpage quotation:

"JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO THE ELECTRIC CHAIR."

He was reported as having told the Jury:

> "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.
>
> "The only hope of steeming the tide of such crimes by youths is to enforce the law, which you have indicated by your decision."

Apparently the jury's decision to impose the death penalty expressed Judge Boyer's personal sentiments against all the defendants. However, the public expression of such personal feelings by Judge Boyer, reported two days before Darcy's trial necessarily was circulated and broadcast throughout Bucks County.

During the very period in which Darcy was being tried, Judge Boyer in another case publicly expressed his antagonism against Philadelphians who came to Bucks County to commit crimes. In the Intelligencer issue of June 12, 1948 (Rel. Ex. 94; 1094a-1095a), there appears the following frontpage headline:

> "Judge Boyer Warns that Bucks County is Tired of Thieves from Phila." * * *

Judge Boyer was quoted as publicly stating:

> "Asserting that 'We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything which isn't being watched,' Judge Calvin S. Boyer, who sentenced an 18-year-old youth to prison yesterday, asked, 'What business did you have to come up here in the first place?'"

> "We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it," Judge Boyer said," (1094a-1095a).

Bucks County is a small rural county in Pennsylvania. Its two principal newspapers, the Doylestown Daily Intelligencer and Bristol Courier, are jointly owned and controlled and, together with the Philadelphia newspapers, were circulated throughout the county. Judge Boyer's personal views and feelings were thus circulated and broadcast throughout Bucks County. It must be inferred that Bucks Countians were aware of Judge Boyer's personal feelings. After all, his feelings reflected the personal indignation of practically one out of every three adults in that county. Therefore, when Judge Boyer even appeared in the courtroom of Judge Keller during the relator's trial, it was ipso facto a constant reminder to all Bucks Countians, that Judge Boyer had publicly praised the Foster-Zeitz jury and had shown his expressed personal antagonism against Philadelphians who made criminal forays into Bucks County.

The majority of the court below recognized that under the circumstances existing at the end of the Foster-Zeitz trial:

> "The situation certainly would have justified a decision to wait awhile before trying the relator or else to try him in another community if trial immediately after the conviction of his confederates was deemed important * * *" (p. 82).

Three days later, Darcy was placed on trial in the same Bucks County Courthouse in spite of the fact that he had previously been granted a severance.

As stated by Judge Kalodner in his dissenting opinion: "It may be well at this point to avert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial":

"Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and * * * he had commended the jury for its verdict."

"Honorable Calvin Boyer was much in and about the courtroom during the course of this trial * * *.

"* * * every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.

"At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said.

"* * * at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.

"* * * during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar * * *

"* * * the jurors knew Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) codefendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the co-defendants with its mandatory death penalty."

There was a "rather striking manifestation of extraordinary interest in the (trial) proceedings" by Judge Boyer.

> It had come "to the jury's observation that a judge (Judge Boyer) other than the trial judge was showing much interest in the case" (pp. 88-89). (Emphasis supplied.)

The effect of Judge Boyer's presence and conduct in the Darcy trial, viewed in the light of the majority's factual findings, constituted a fundamental unfairness proscribed by the due process guarantee. Judge Boyer was well known in Bucks County; he had presided over the Foster-Zeitz trial; he had commended the Foster-Zeitz death verdict; he had publicly expressed his antagonism against outsiders (Robert White incident); and three days after the Foster-Zeitz verdict, when Darcy was placed on trial in the same Court, Judge Boyer was in attendance and participated as much as if he had been the trial judge. The undisputed fact that he was present and showed an "extraordinary interest" in the Darcy trial and that he had a hostile attitude towards "outsiders," necessarily effectively influenced and guided the jurors' imposition of the death sentence.

As stated by Judge Kalodner, Judge Boyer's presence and manifest interest of themselves raised a substantial due process question, principally because the jurors identified him as an official who was hostile to Darcy:

> "I believe that if the jurors identified Judge Boyer 'as an official who was hostile' to Darcy, such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a 'hostile' attitude of a judge can, and almost universally does, effectively influence and guide the jury's verdict."
>
> * * *
>
> "The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship" (pp. 89-90).

See *Starr vs. United States*, 153 U. S. 614, 626 (1894); *Quercia vs. United States*, 289 U. S. 466, 470 (1933); *Commonwealth vs. Myma*, 278 Pa. 505, 508 (1924); *United States vs. Link* (C. A. 3), 202 F. 2d 592, 595 (1953); *United States vs. Brandt* (C. A. 2), 196 F. 2d 653, 656 (1952).

B.

Judge Boyer's Active Participation in Petitioner's Trial and, Particularly, His (a) Having Made a Ruling Therein, and (b) Having Passed a Note to the District Attorney During the Court's Charge Amounted to a Silent But Eloquent Extra-judicial Aid to the Prosecutor and "To Such Improper Partisan Participation by Judge Boyer in the Trial" as to Constitute a Denial of Due Process.

The record clearly shows that Judge Boyer actively participated in petitioner's trial. The majority opinion recognized that at times he joined Judge Keller on the bench for "whispered consultations within the view of the jury" and that "at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling." And that he, in effect and in fact, "sat" on the bench with Judge Keller during the course of the trial.

(a)

JUDGE BOYER DID ACTIVELY PARTICIPATE IN DARCY'S TRIAL WHEN HE ASSISTED IN RULING ON ADMISSION IN EVIDENCE.

During a side bar discussion out of the hearing of the jury shortly after court convened on Saturday morning, June 12,

a difficult question of law on the admissibility of evidence of other offenses in view of the Pennsylvania Act of July 3, 1947, P. L. 1239 (19 P. S. 711), arose. (1144a-1146a). This question was a very vital one, for, if the ruling were favorable to the Commonwealth, the jury would have for its consideration Darcy's written admissions of other holdups in which he had participated. With such confession before it, the Darcy jury would be more easily persuaded to dispense with any leniency toward the relator. As a matter of timing, the ruling on this evidence was also important, because the Commonwealth closed its case shortly thereafter. Judge Boyer's participation in the ruling, although out of the hearing of the jury, could not help but be noticed by the jurors. The District Court's finding that Judge Boyer left the bench shortly thereafter and did not return during the remainder of the trial is meaningless because the introduction of evidence ended shortly thereafter.

(b)

NOTE PASSING INCIDENT ESTABLISHES IMPROPER PARTICIPATION BY JUDGE BOYER IN THE DARCY TRIAL.

Miss Marian Ford, Joseph Darcy and Miss Margaret Gordon, witnesses called by the relator, had testified in substance that at the conclusion of his charge in the relator's case, Judge Keller had inquired of counsel whether he had omitted anything or if there were any corrections. They testified that Mr. Achey, defendant's counsel, indicated he had no objections or corrections and that Judge Keller thereupon proceeded to conclude his charge to the jury. Each of these witnesses testified that Mr. Biester, who was then seated next to Judge Boyer opposite the jury box, received a note from Judge Boyer, read it, stepped to the

front of the bench and interposed objections to the Court's Charge (481a-483a; 484a; 542a-544a; 631a-617a).

Excerpts from the Transcript of Trial of *Commonwealth vs. Darcy*, with reference to Judge Keller's charge and the objection of District Attorney Biester, appear in the Appendix at 1146a-1150a. The *time element* intervening between Judge Keller's request for corrections and suggestions and Mr. Biester's objection (1148a-1149a) corroborates the testimony of relator's three witnesses as to the passing of the note from Judge Boyer to Mr. Biester.

Mr. Biester claimed that he decided to make the objection "immediately after Judge Keller made his statement which I was not in accord with" (914a). The statement made by Judge Keller immediately before the objection was made had nothing to do with the subject matter of the objection. The subject matter of the objection (1148a) relative to the issue of flight—had been mentioned by Judge Keller long before the conclusion of his charge. Mr. Biester's objection was:

> "MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.
>
> THE COURT: I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt, that this shooting of Kelly did not occur during the perpetration of a robbery."

The testimony of the respondents' witnesses in denial of the testimony of Miss Ford, Joseph Darcy, and Miss

Gordon, is equivocal and cannot constitute a contradiction thereof.

Mr. Biester testified that he had "*No recollection whatsoever*" that "during the charge a note was written and passed by Judge Boyer" to him (877a-878a). He did not specifically deny that such note was written and passed by Judge Boyer to him during Judge Keller's charge in relator's trial, although the present petition for writ of habeas corpus raising this very issue was filed in the District Court on April 3, 1951 and subsequently the subject of argument before the Court of Appeals. More than two years intervened between the date of the first argument before the court below and March 20, 1954 when he so testified that he had "no recollection whatsoever" (878a).

If the incident had not occurred Mr. Biester, who was District Attorney and is now a Judge, certainly knew enough about the rules of evidence to know that the note passing either occurred or did not occur. Later, he testified: "But I do not recall having received the note, or any relation between my arising and the reception of the note" (878a). See also cross-examination of Mr. Biester (911a-914a).

Mr. Curtin, then Assistant District Attorney, testified that he had "Absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the Charge of the Court" at the relator's trial (733a). He did not specifically deny that such a note was written and passed by Judge Boyer to Mr. Biester during Judge Keller's charge.

The majority recognizes that the note-passing incident would have been considered "such improper partisan participation by Judge Boyer in the trial," as to come within reach of the due process clause, had the incident been established by the evidence.

The majority's conclusion, with reference to this incident, is based upon an anomalous finding: that while "the Gov-

ment's showing (that it had not occurred) was less than overwhelming * * * yet it was not unsubstantial," and since "the District Court made a specific finding that this alleged occurrence did not take place * * * we think we are not justified in disturbing that finding" (p. 84).

As opposed to the direct testimony of three witnesses for Darcy that during Judge Keller's charge Judge Boyer sat in his "*special chair*" with Mr. Biester seated nearby, that Judge Boyer passed a note to Mr. Biester who *thereupon* arose and interposed an objection to a point in Judge Keller's charge, we have the "*no recollection*" *testimony of* Mr. Biester, the District Attorney (876a-878a, 884a) and of his assistant, Mr. Curtin (731a-733a, 739a).

It is submitted that where a man's life is at stake, as in the instant case, such "no recollection" testimony as given by Mr. Biester and Mr. Curtin cannot and should not be regarded as a "substantial" basis for a finding of fact such as was made by the District Court in this case. Certainly, trial attorneys with the experience of Mr. Biester and Mr. Curtin should have known whether such an incident had or had not occurred.

It is pointed out further that it is uncontradicted that the District Attorney and his assistant testified that, during Judge Keller's charge to the jury, *they had left their customary places at the Commonwealth table*, close to the bench and only four feet from the jury, and sat in chairs at the press table, which were on the opposite side of the courtroom some fifteen feet distant from the jury and some eight feet from Judge Boyer's "special chair." This admitted circumstance certainly corroborated the testimony of the relator's three witnesses as to this incident having occurred.

Further, again it must be pointed out that the objection raised to the Court's charge by Mr. Biester was one that an experienced trial attorney would have raised immediately upon Judge Keller's having asked for suggestions or correc-

tions at the close of his charge. The time element elapsing between Judge Keller's requests for corrections or suggestions and Mr. Biester's interposing his objection corroborated petitioner's contention that the matter was brought to Mr. Biester's attention by the note-passing to him by Judge Boyer.

Certainly, Judge Boyer's extraordinary and unprecedented conduct has never been duplicated in any other criminal trial in Pennsylvania Courts. It was and is not customary, in normal procedure in a Pennsylvania criminal trial, to have virtually a "*two-judge*" *bench*. Judge Boyer's presence and conduct had such a lasting and compelling impact and impression upon the jury as to take it out of the category of "state procedure" and to bring it within the protection of the due process guarantee of the Fourteenth Amendment.

As stated by Chief Judge Biggs in his dissenting opinion:

> "Judge Boyer's preoccupation with Darcy's trial was intense * * *. From his repeated visits to and his behavior in the courtroom, the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like Foster and Zeitz, should be found guilty, and that the penalty of death should be imposed upon him by the jury: That such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. *Fairness cannot condone Judge Boyer's conduct*" (pp. 101, 102).

It is submitted, therefore, that Judge Boyer's presence and conduct in the Darcy trial was more than "a dubious occurrence". By no stretch of the imagination can his conduct be considered as fair. Indeed, it did amount to a denial of due process.

III.

CONCLUSION.

Although any one of the errors listed above requires the issuance of a writ of habeas corpus and the granting of a new trial, their multiplication certainly calls for a new trial to which the petitioner can obtain the protection of due process.

When a defendant is tried before a "two judge bench" by a district attorney assisted by the "overseer judge" on that bench, in a community inflamed by prejudice and passion, then such trial is, in the words of Mr. Justice Holmes, "a mask": *Moore vs. Dempsey*, 261 U. S. 86, 91. The outcome, under such circumstances, is inevitable.

WHEREFORE, it is respectfully submitted that the judgment of the court below should be reversed.

CHARLES J. MARGIOTTI,

J. DRESS PANNELL,

MORTON WITKIN,

Attorneys for Petitioner.

August 12, 1955.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,564.

UNITED STATES OF AMERICA, ex rel.,
DAVID DARCY,

Appellant,

v.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, Rockview, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued April 4, 1955.

Before: BIGGS, Chief Judge, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

OPINION OF THE COURT.

(Filed June 9, 1955.)

By HASTIE, Circuit Judge.

In this habeas corpus proceeding the relator, a Pennsylvania state prisoner under sentence of death for murder, is contending that he was tried under such prejudicial circumstances and improper influences that it becomes the duty of a federal court to invalidate the state conviction as a denial of due process of law and to order a new trial.

The district court originally dismissed the petition without permitting relator to introduce evidence in support of his contentions. 97 F. Supp. 930. But on appeal this court ruled "that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial; including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice." 203 F. 2d 409. Accordingly, the case was remanded to the district court for a full hearing on the indicated issues.

In compliance with our mandate the district court permitted the parties to make an elaborate showing of the circumstances under which the relator was tried in Bucks County, Pennsylvania, for felonious homicide in the commission of an armed robbery. Although the relator had been contesting his conviction for more than six years, this was the first opportunity given him to introduce evidence to establish facts not apparent on the face of the original trial record which, in his view, would make clear that the

trial was fundamentally unfair. In affording this opportunity, the district court devoted eight days to the testimony of more than thirty witnesses and the introduction of much documentary evidence. As a result, that court and this reviewing court now for the first time have been able to exercise fully informed judgment as to the essential fairness of the murder trial. It was specially important that this be done because there had been no taking of testimony on the relevant circumstances of the trial before any Pennsylvania state court in which the conduct of relator's trial had been challenged as essentially unfair. We emphasize this because we believe it is a virtue of our system of justice, as implemented by the due process clause of the Fourteenth Amendment, that it does not send a convicted person to his death without according him one full opportunity to prove charges of unfair trial which are not patently frivolous. The important thing here is that relator has now had that chance.

After full hearing and consideration of all of the evidence the district court was satisfied that relator's new proof was insufficient to establish that his trial had been fundamentally unfair. ——F. Supp——. We agree with that conclusion.

Relator has attempted to show that he was tried in a community so aroused against him that a fair trial was impossible, or at best so unlikely that a decent legal system must permit a second trial. Such a conclusion has been reached where the physical presence of a mob or a threat of mob violence has dominated a criminal trial. *Frank v. Mangum*, 1915, 237 U. S. 309; *Moore v. Dempsey*, 1923, 261 U. S. 86; *Powell v. Alabama*, 1932, 287 U. S. 45. But on the evidence adduced in the district court it is clear, as that court found, that relator's trial was conducted with dignity and decorum and without any hostile congregration or demonstration at or near the place of trial. Indeed, dur-

ing much of the trial the courtroom was not crowded. Certainly, the trial was not attended by any threat of violence or manifestation of mass hysteria. Moreover, a clear and elaborate showing was made to the district court that throughout relator's trial the jury was kept under strict guard, apart from other persons and without access to newspapers, radio, television or any other source of news or opinion.

However, the relator suggests that even though the jury was segregated and the community was outwardly calm during the trial, antagonism and hostility toward him were so great and widespread during the period immediately preceding the trial, that the probability of a prejudiced verdict from any jury of the vicinage was a greater risk than a society which insists upon equal justice under law can take. A combination of unchallenged facts has made it very difficult for the relator to establish such extreme and pervasive hostility. The record of the original trial, which is before the court in this collateral proceeding, shows that each of the prospective jurors was subjected to a searching *voir dire* examination. The questioning of the fourteen persons who became the jurors and alternates for this trial takes up some seventy pages of the typewritten record. Their responses indicated that they were capable of making and disposed to make a fair and objective evaluation of the evidence. Beyond that, original counsel for the relator was sufficiently satisfied with the responses of these veniremen so that he used less than half of the peremptory challenges available to him. And he did not at any time ask for a change of venue. Concerning the significance of this, see *Stroble v. California*, 1952, 343 U. S. 181, 194; *United States v. Rosenberg*, 2 Cir. 1953, 200 F. 2d 666, 669. While to a majority of this court these facts alone have not seemed so compelling as to preclude an independent showing that the trial was dominated by preju-

dice and hostility, they certainly make the undertaking very difficult. To meet this difficult burden of proof relator has relied largely upon the daily newspaper accounts and editorial comments published in the community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial. We have examined all of this material. The evidence does not indicate, as relator would infer, that the jurors who tried relator were waiting in or near the courtroom during the period of the trial of his confederates. At most it indicates that during the two weeks immediately preceding relator's trial the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators. But it does not appear that feeling ran so high or that hostility toward the relator was so intense and so general as to make it seem incredible that the search for a satisfactory jury would yield twelve persons as open minded about this case as the jurors here claimed to have been. The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors. It covers no more than the minimum protection which, consistent with our present ideas of justice, every court must afford. In this view of the reach of due process, we can not say that trial of relator at the time and place in question was a denial of constitutionally required protection.

Relator makes a second contention. Judge Hiram Keiler

presided over relator's trial. But another judge of the same court, Honorable Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict. It is relator's contention that Judge Boyer's participation in and influence upon the trial were so unfair and prejudicial as to amount to a denial of due process of law. Here too the facts are now for the first time fully disclosed in the record. Relator's trial began June 7, and he was convicted June 14. There were daily morning and afternoon sessions. It now appears that every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session. At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said. It is also admitted that at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling. However, there is no claim that any erroneous or prejudicial ruling resulted from consultation between the presiding judge and his colleague. Finally, during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar and participants in the trial.

It seems to be agreed that the jurors knew who Judge Boyer was. The evidence makes it very probable that they also knew that he had just completed the trial at which relator's co-defendants had been convicted and sentenced to death. Moreover, it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the co-defendants with its mandatory death penalty. Relator also makes the point that, while his trial

was in progress, the press quoted statements of Judge Boyer in another case reasonably calculated to indicate that the jurist was engaged in an effort to make it clear that the community would deal very sternly with wrongdoers from Philadelphia, a category which included the relator. But this last incident could not have affected the jury in relator's case, because the jurors had no access to any source of news. Nevertheless, relator argues that the overall effect of this situation was to make Judge Boyer's impressive record of attendance at this trial an intolerably coercive influence upon the trial jury. But we think this is attaching too much significance to the jury's observation that a judge other than the trial judge was showing much interest in the case. Certainly Judge Boyer was privileged to attend and observe proceedings of the court of which he was a judge. His presence in itself was not an impropriety. Even if the jurors identified him as an official who was hostile to the relator we think it would be necessary to show that he had said or done something prejudicial to the defendant during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question.

The present petition charges one such act and this allegation has given us great concern. The relator alleged and attempted to prove that during the trial Judge Boyer actively helped the prosecutor. Specifically, there was testimony from witnesses who may well not have been unbiased that on one occasion Judge Boyer passed a written message to the prosecutor with the result that the prosecutor made a point to the presiding judge about an item in the charge. The government introduced evidence for the purpose of disproving this contention. The government's showing was less than overwhelming. Yet it was not unsubstantial. There was a sufficient conflict of testimony to make it necessary for the district court as the trier of facts in this

habeas corpus proceeding to resolve the factual question whether Judge Boyer did or did not coach and advise the prosecutor as alleged. The district court made a specific finding that this alleged occurrence did not take place. On the record we think that we are not justified in disturbing that finding. And absent some such improper partisan participation by Judge Boyer in the trial, we cannot say that his rather striking manifestation of extraordinary interest in the proceedings constituted a denial of due process of law. It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court. With *Betts v. Brady*, 1942, 316 U. S. 455, contrast *Johnson v. Zerbst*, 1938, 304 U. S. 453.

No other point urged by relator warrants appellate interference with the decision of the district court or requires particular comment.

The judgment will be affirmed.

KALODNER, Circuit Judge, dissenting

Under Pennsylvania law the jury fixes the penalty in first degree murder cases—imprisonment for life, or death.[1]

It is against the forefront of that grim and grave circumstance that Judge Boyer's conduct in the Darcy trial must be viewed, weighed and assessed and the issue determined whether Darcy was denied the due process guaran-

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[1] 18 P. S. §4701. "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

teed him by the Fourteenth Amendment. In doing so it must ever be kept in mind that "due process of law in the enforcement of a state's criminal law * * * expresses a demand for civilized standards of law" and "judicial review of that guaranty of the Fourteenth Amendment inescapably imposes * * * an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people *even toward those charged with the most heinous offenses*".[2] (emphasis supplied).

In my opinion the majority has failed to discern and assess the impact of Judge Boyer's conduct in the Darcy trial from the point of view at the minimum, of the jury's role in determining Darcy's fate—life or death.

I am of the opinion, too, that the majority erred in another important respect—in treating Judge Boyer's conduct as an "occurrence", albeit "dubious", "in state procedure", immune as such, from federal judicial remedial action.

Let us first consider the issue of Judge Boyer's role in the Darcy trial.

Bucks County, where Darcy was tried, at the time had a population of approximately 144,000—75 percent rural, 25 percent urban. Judge Boyer, then 72 years of age, was a native of Bucks County and had spent his entire life in the community. He had been a judge of the Bucks County Courts for some eighteen years. The extent to which he was known in the county is demonstrated by the fact that he had been its district attorney, twice by appointment and once by election, he had twice been elected for 10-year terms as judge (once in 1931 and again in 1941).

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[2] Concurring opinion of Mr. Justice Frankfurter in Malinski v. New York, 324 U. S. 401, 414, 416, 417 (1945).

Judge Boyer had presided at the trial of Darcy's two confederates which terminated Friday, June 4th with a verdict of guilty and the imposition of death sentences by the jury. Judge Boyer had complimented the jury on its action, stating: "*I don't see how you could*, under the evidence, *have reached any other verdict*. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. *The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision.*", (emphasis supplied).[3]

Three days later, Darcy was placed on trial in the same court house in spite of the fact that he had previously been granted a "severance".[4] While I agree with the majority that this circumstance, standing alone, did not constitute denial of due process, it merits most serious consideration in evaluating the impact of Judge Boyer's conduct in the Darcy trial since the trial of the confederates had been

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[3] Quotation is from a first page article in the "Doylestown Daily Intelligencer" on Saturday morning June 5th carrying an account of the jury's verdict the preceding day. It was captioned "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair". (Relator's Exhibit No. 78).

[4] Under Pennsylvania law "severances" are granted as a matter of absolute right when applied for by a defendant in a murder case. They are designed to grant the defendant a "separate" trial. It is interesting to note that the majority in noting that Darcy had been placed on trial only three days after conclusion of the trial of his confederates had this to say:

> "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of a fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors."

widely reported not only in the local newspapers and via radio but in nearby Philadelphia newspapers which had a considerable circulation in Bucks County.[5]

President Judge Hiram H. Keller of the Bucks County Court presided at Darcy's trial. He had, at the time, served some eighteen years as president judge.

It may be well at this point to advert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial:

> *"Honorable Calvin Boyer was much in and about the courtroom during the course of this trial. . .*
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> *". . . every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.*
>
> *"At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury* although there is nothing to suggest that the jury could hear what was being said.
>
> *". . . at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.*
>
> *". . . during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar . . .*
>
> *". . . the jurors knew who Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) codefendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury*

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[5] I imply no criticism of the newspaper, radio or television coverage of the trial of Darcy's confederates or his own, or of the events which preceded them.

for the first degree verdict against the codefendants with its mandatory death penalty."

There was a *"rather striking manifestation of extraordinary interest in the* (trial) *proceedings"* by Judge Boyer.

It had come *"to the jury's observation that a judge* (Judge Boyer), *other than the trial judge was showing much interest in the case."* (emphasis supplied)

Despite these significant and critical findings the majority concluded that Judge Boyer's presence and conduct in the Darcy trial fell short of the fundamental unfairness proscribed by the due process guarantee.

It went so far as to declare that *"Even if the jurors identified him* (Judge Boyer) *as an official who was hostile to the relator* (Darcy) that would not be enough; . . . it would be necessary to show that he (Judge Boyer) *had said or done something* prejudicial to the defendant during his stay in the courtroom *before the fact of his presence and manifest interest* could raise a substantial due process question."

I disagree with the majority's conclusion.

I believe that if the jurors identified Judge Boyer "as an official who was hostile" to Darcy such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a "hostile" attitude of a judge can, and almost universally does, effectively influence and guide a jury's verdict.

My opinion is based on intensive observation of juries during the ten years which I spent as presiding judge in the trial of criminal cases before I came to the appellate bench.

I know from first-hand experience how the members of a jury, consciously or subconsciously, are ever on the alert to glean from what a judge has said or done during the

course of a trial his opinion as to the guilt or innocence of a defendant. Jurors look, figuratively speaking, to every spoken word, to every nuance and inflection, to every gesture, no matter how slight or unintentional, to the extent and tenor of judicial participation in examination or cross-examination, to anything which could conceivably be construed as a straw in the wind as to the judicial "attitude".

The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship.

"It is obvious that under any system of jury trials *the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.*" Star v. United States, 153 U. S. 614, 626 (1894); Quercia v. United States, 289 U.S. 466, 470 (1933)." (emphasis supplied).

The Supreme Court of Pennsylvania has similarly appraised the judge-jury relationship, stating, in the leading case of Commonwealth v. Myrna, 278 Pa. 505, 508 (1924): "The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The *judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance*, and from whom the litigants expect absolute impartiality. *An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table.* To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. *It has a tendency to take from one of the parties the right to a fair and impartial trial, as*

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[6] We applied the principle stated in United States v. Link, 202 F 2d 592, 595 (1953).

guaranteed under our system of jurisprudence." To the same effect see Commonwealth v. Trunk, 311 Pa. 555, 566 (1933); Sorrentina v. Graziano, 341 Pa. 113, 119 (1941); Schlessinger Petition, 367 Pa. 476 (1951); Commonwealth v. Claiborne, 175 Pa. Sup. Ct. 42, 50 (1953)[1] (emphasis supplied).

Evidencing its insistence upon strict conformity with these expressed standards governing judicial office, the Supreme Court of Pennsylvania has held that their breach constitutes a deprivation of "due process".

It did so in DiBona, Adm'r v. Philadelphia Transportation Company, 356 Pa. 204, 216 (1947), stating: "Judges should never forget that 'the first and most essential element in a jury trial is a wise, learned, impartial and competent judge'. See Martin et al. v. Phila. Gardens, Inc., 348 Pa. 232, 236 . . . and Com. v. Brown, 309 Pa. 515, 521 . . . *A litigant who is denied this 'essential element' is deprived of 'due process of law'.*" (emphasis supplied).

It may be said that the foregoing is inapposite in the instant case because Judge Boyer was not the "presiding judge" at Darcy's trial. On that score it need only be pointed out, as the majority found, that Judge Boyer time and again "sat" on the bench with Judge Keller during the course of the trial and that he "at times . . . joined Judge Keller on the bench for whispered consultations within view of the jury" and further, "at least one such

[1] The United States Court of Appeals for the Second Circuit in United States v. Brandt, 196 F. 2d 653, 656 (1952), expressed a similar view with reference to the judge-jury relationship, stating: **"Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury or laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence."** (Emphasis supplied)

consultation was designed for the *guidance of Judge Keller in the making of a trial ruling.*" (emphasis supplied).

Coming now to the majority's statement that in the absence of proof that "Judge Boyer had said or done something prejudicial during his stay in the courtroom", there could be no finding of denial of due process:

In my opinion the record more than amply demonstrates that Judge Boyer "had done something prejudicial" to Darcy. The majority's own finding of his "rather striking manifestation of extraordinary interest in the proceedings" and its implicit recognition of the jury's identification of Judge Boyer as "hostile" establish that Judge Boyer "had done something prejudicial".

If more is needed the record supplies it.

The jury "knew" who Judge Boyer was. They "knew" he had presided at the trial of Darcy's confederates and they knew that he had praised the jury for finding them guilty and sentencing them to death.[8] They "knew" Judge Boyer "was showing much interest in the case". They "knew" the extent of his "interest" from the fact that he was in daily attendance at the trial and that "he even attended an evening session". They "knew" it from the fact of his "whispered consultations" with Judge Keller and they "know" it from the fact that he sat hours at a time, in a specially-placed chair on the front row, directly facing the jury and within its view.

Sitting there in that chair, staring the jury in the eye, as it were, Judge Boyer was to it an uncompromising watchful omnipresence; a stern sentinel of justice; an "overseer judge" over the jury itself, dedicated to the meting out of the fullest measure of penalty to the defendant; a silent but eloquent extra-judicial aid to the prosecuting attorney.

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[8] The voir dire examination of the jurors in the Darcy case disclosed that 89 percent of them had read the newspaper accounts of the trial of Darcy's confederates

I cannot conceive of a more striking example of judicial "guiding" of a jury's verdict—I refer particularly to the jury's imposition of the death sentence—than was so glaringly apparent in the instant case. It falls squarely within the reach of the prevailing rule proscribing undue judicial influence on a jury, and constituted fundamental unfairness violative of the due process clause. DiBona, Adm'r. v. Philadelphia Transportation Company, supra.

The duty of this court to give consideration to the "*totality of facts* in a given case" where the due process clause is invoked, was clearly spelled out by the Supreme Court of the United States in Betts v. Brady, 316 U.S. 455 (1942) (emphasis supplied).

> "The phrase (due process) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial *is to be tested by an appraisal of the totality of facts in a given case.* (p. 462)
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> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is *offensive to the common and fundamental ideas of fairness and right* . . ." (p. 473) (emphasis supplied)

Again, in Johnson v. Zerbst, 304 U.S. 458 (1938). The Supreme Court said (pp. 465-66):

> "True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error'. *These principles, however, must be construed and applied so as to preserve*

—*not destroy—constitutional safeguards of human life and liberty.* The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment." (emphasis supplied).[2]

I come now to the alleged note-passing incident which the majority indicated it would have considered "such improper partisan participation by Judge Boyer in the trial" as to come within the reach of the due process clause had it been established by the evidence.

I have deferred discussion of this phase of the case because of my view that independent of the note-passing incident the record sufficiently disclosed that Judge Boyer had "done something" prejudicial in violation of the due process guarantee.

The sum total of the majority's view with reference to the note-passing incident is that while "the government's showing (that it had not occurred) was less than overwhelming . . . yet it was not unsubstantial" and since "the district court made a specific finding that this alleged occurrence did not take place . . . we think we are not justified in disturbing the finding."

I disagree with the majority.

Three witnesses for Darcy testified that *during* Judge Keller's charge Judge Boyer sat in his "special chair" with the district attorney seated nearby; that Judge Boyer passed a note to the district attorney and the latter thereupon arose and addressed Judge Keller with respect to a point in his charge.

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[2] "As applied to a criminal trial **denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.** In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba v. California, 314 U. S. 219, 236 (1941). (Emphasis supplied.)

The district attorney [10] and his assistant [11] testified that

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[10] Testimony of District Attorney Biester—N. T. pp. 888-89:

"Q. Do you recall—strike that. During the charge of the Court will you tell us, please, what you recall of the charge so far as your location in the courtroom is concerned?

"A. My best recollection is that when the charge began, or very early in the charge, Mr. Curtin and I retired to the seats which are in front of the table nearest to the right of the sitting Court.

"Q. Is that the table which has been identified by some persons as being a press table?

"A. I heard Mr. Curtin refer to it in language that might be assumed to be a press table. That is the table I am referring to.

* * * * * * * * * * * *

"Q. And were you seated there with any other person?

"A. Mr. Curtin was there with me. I, of course, don't recall whether we were there for every moment of the charge, but my recollection is that we were there for a major part of the charge.

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"Q. Do you have any recollection of Judge Boyer being present in the courtroom during any portion of the charge?

"A. I have not.

* * * * * * * * * * * *

"Q. There has been testimony to the effect that during the charge a note was written and passed by Judge Boyer to you. Now, do you have any recollection of any such incident?

"A. No recollection whatsoever."

[11] Testimony of Assistant District Attorney Curtin—N. T. pp. 713-14-15, 21:

"Q. How far was the Commonwealth's table from the nearest juror?

"A. The front of the Commonwealth's table would be about four to five feet from the front of the nearest juror—the front of the chair of the nearest juror.

"Q. And how far was it from the Commonwealth's table to the—strike that. Was there a table to the rear of the Commonwealth's table?

"A. There was.

"Q. And what was the purpose of that table?

"A. That was a table where the reporters constantly sat and where they were seated during this trial when they were there.

* * * * * * * * * * * *

"Q. Can you give us any estimate of the distance between the Commonwealth's table and the table which, I believe, you have referred to as being used by members of the press?

"A. I would say there was at least fifteen feet separating those two tables.

* * * * * * * * * * * *

during the course of Judge Keller's charge they did not sit at their customary places at the Commonwealth's counsel table which was about four feet or so from the jury, but instead sat at the press table some 15 feet distant (on the opposite side of the room); the chairs in which they sat at the press table were some eight feet or so away from the "special chair" reserved for Judge Boyer's use; they had "no recollection" whether Judge Boyer was at the time seated in his chair; they had "no recollection" whether Judge Boyer had passed a note to the district attorney as testified to by the relator's witnesses.

"Q. Now, Mr. Curtin, do you recall where Mr. Biester was seated during the charge of the Court?

"A. To the best of my recollection, sir, both Mr. Biester and I were seated in two of the chairs in the first of the two rows of chairs which were immediately in front of the reporters' table.

* * * * * * * * * * * *

"Q. Do you recall whether there was anyone sitting at the Commonwealth's table during the charge of the Court?

"A. I believe that I went to it for a few minutes but, to the best of my recollection, the Commonwealth's table had no one seated at it during most of Judge Keller's charge.

"Q. Do you recall seeing Judge Boyer in the courtroom during the Court's charge?

"A. I have no recollection whatsoever of Judge Boyer being in the courtroom during the charge of Judge Keller.

"Q. Do you have any recollection of any note having been handed by Judge Boyer to Mr. Biester at any time during the charge of the Court?

"A. I have absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the charge of the Court.

* * * * * * * * * * * *

"Q. Now what you called the reporters' table, is that the one that is between your table and the body of the courtroom?

"A. No, you are pointing to the defendant's table there.

"Q. Defendant's table, all right. Then the reporters' table was here—you said some distance—I think you said about eight feet from the chair marked 'Judge Boyer'?

"A. About eight feet from the front of the chair marked 'Judge Boyer' to the back of the chair behind the reporters' table; eight or ten feet."

The district attorney also testified that he had "no recollection" as to whether Judge Boyer had "assisted him" in the Darcy trial.[12]

It was on the basis of this "no recollection" testimony that the District Court Judge made the factual finding that the note-passing incident had *not* occurred and that Judge Boyer had not at any time assisted the district attorney.

In my opinion, in a case where a man's very life is at stake, *non-negating* testimony such as was given by the district attorney and his assistant cannot be regarded as affording "substantial" basis for a fact-finding such as was made by the District Court in the instant case.[13]

One cannot simply shrug off with a "no recollection" statement affirmative testimony of such an extraordinary event as the passing of a note by a judge to a prosecuting attorney in a murder trial.

Note-passing by a judge, to a district attorney, can scarcely be regarded as a casual, routine, every-day, run-of-the-mine occurrence. The implication of such an occurrence could scarcely escape an experienced prosecuting attorney and the event would have been indelibly inscribed upon his memory. But curiously here the district attorney had "no recollection" as to whether *it had happened or had not happened.* And even more curiously, lightning

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[12] N. T. p. 896:

"Q. At any time during the Darcy trial did Judge Boyer assist you in any way in the presentation of the evidence in the trial of the case?

"A. I have no recollection of such a situation at all, Mr. Van Artsdalen."

[13] The testimony disclosed that it was Zeitz, one of Darcy's confederates who had killed the deceased by one of two bullets which he fired in the course of their "get-away" from the scene of the hold-up; that Darcy had not fired his gun at the time. Darcy then was 22 years old. These facts, it is urged, might have been taken into consideration by the jury—at least to the extent of imposing a life sentence—had it not been "coerced" by Judge Boyer.

seems to have struck twice, because the assistant district attorney who was admittedly sitting by his side also has "no recollection" whether *it had happened or had not happened.*

It seems to me that the thread of a man's life, no matter how "heinous" his crime, should not be snapped asunder by the erratic, dulled blade of "no recollection".

My resolution in this respect is reinforced by the admitted but unexplained circumstance that the district attorney and his assistant, when the trial judge began his charge to the jury, saw fit to leave their customary places at the Commonwealth table, close to the bench and only four feet from the jury, and to seat themselves some 15 feet away at the press table, which, as they said, was some eight feet from "Judge Boyer's chair".

In conclusion I will dwell but briefly with the majority's view that Judge Boyer's conduct was an "occurrence—in state procedure", immune, as such, from the reach of the due process guarantee. Implicit in the majority's discussion on this score [14] is its recognition that Judge Boyer's conduct was "dubious" and its indication that it would have "proscribed" it had it happened in a trial in a federal court and would have considered it as a compelling basis for granting a new trial.

Shaken down to its hard core the majority's position —bluntly stated—is this: Darcy was grievously hurt by Judge Boyer's conduct but we cannot help him because he was hurt on the other (the State) side of the street; otherwise stated, there is no constitutional redress for Darcy despite the fact that he was unfairly tried because it was

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[14] "It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court."

his fate to be tried in a State court instead of a Federal court.

I do not agree.

I cannot draw as fine a line as the majority has drawn when the terminus of that line is death.

The mere circumstance that what happened to Darcy occurred in a State and not in a Federal court cannot operate to deprive him of his constitutional rights.

Judge Boyer's extraordinary and unprecedented conduct was totally foreign in every respect to the normal procedural course of a criminal trial in the Pennsylvania courts. It was not in any sense within the periphery of what may be described as the customary and normal procedure in Pennsylvania criminal trials. Its significance in its compelling impact upon the jury was of such proportion and vitality as to take it out of the category of "state procedure".

It is not incidental to any accepted standard of state procedure for a judge to conduct himself as Judge Boyer did in the Darcy trial. It is not incidental in Pennsylvania for a judge who has just completed a trial of a defendant's confederates and praised the jury which found them guilty and fixed death as their penalty, to participate, as Judge Boyer did, in the trial of a third confederate, presided over by the president judge of his court. It is not incidental for a judge to have a "special chair" placed for his use on the front row of the courtroom where he is in full view of the jury and it is within his full view and for him to sit there as an extra-curricular judicial overseer.

And it is not incidental in Pennsylvania criminal trials for a judge "to pass a note" to the district attorney.

In my opinion it can fairly be said of Judge Boyer's conduct that "This is conduct that shocks the conscience" in violation of the due process guarantee.[15]

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[15] Rochin v. California, 342 U. S. 165, 172 (1952).

Its inevitable effect was to distort the trial process to the extent at least that Darcy was deprived of a possible unprejudiced jury determination that justice required only the imposition of a life sentence instead of death.[16]

Of Judge Boyer's conduct it can also be said, as the Supreme Court of the United States said in Chambers v. Florida, 309 U. S. 227 (1940):

> ". . . no man's life, liberty or property (can) be forfeited as criminal punishment . . . until there has been a charge fairly made and *fairly tried* in a public tribunal *free of prejudice, passion, excitement and tyrannical power*". (pp. 236-37)
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> * * * * * * * *
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> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (p. 241) (emphasis supplied).

Upon consideration of the "totality of facts", evidenced by the Darcy trial record, as directed by the Supreme Court of the United States in Betts v. Brady, supra, and applying the rule there stated that ". . . the Fourteenth Amendment prohibits the conviction . . . of one whose trial is offensive to the common and fundamental ideas of fairness and right"[17], I am of the opinion that the judgment

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[16] See Note 13.

[17] In Buchalter v. New York, 319 U. S. 427, 429 (1943) the late Mr. Justice Roberts stated the applicable rule as follows:

"The due process clause of the Fourteenth Amendment requires that action by a state . . . must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'."

To the same effect, see Rochin v. California, 342 U. S. 165, 169 (1952) wherein it was stated:

of the District Court should be reversed and the prayer of the relator granted.

McLaughlin, Circuit Judge, authorizes me to state that he concurs with the views expressed in the foregoing dissent.

BIGGS, Chief Judge, dissenting.

On reviewing the record in this case I cannot avoid an abiding conviction that the judicial process under which Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. The brutal crime committed by Darcy, Foster, Zeitz and Capone had angered the citizens of Bucks County. By editorials, news stories and comments the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications.

Though Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, 19 P.S. Pa. §75, the severance was rendered worthless when his trial was proceeded with only three days after that of Foster and Zeitz. Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness.

Judge Boyer's preoccupation with Darcy's trial was intense. He had been on the bench for many years and was a man of great weight in the community. He had complimented the jury at the close of the trial of Foster and Zeitz

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"Due process is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder v. Mass., 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty', Palko v. Conn. 302 U. S. 319, 325."

for imposing the death penalty and this fact had been widely publicized immediately preceding the commencement of Darcy's trial. From his repeated visits to and his behavior in the courtroom the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like Foster and Zeitz, should be found guilty and that the penalty of death should be imposed upon him by the jury: that such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. Fairness cannot condone Judge Boyer's conduct.

The foregoing amounts to a denial of due process. A writ of habeas corpus should issue in this case and Darcy should be granted a new trial. The grant of the writ will not prevent him from being tried again for he cannot successfully plead double jeopardy.